TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 154

ST. LOUIS MALLEABLE CASTING COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE G. PRENDERGAST CONSTRUCTION COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED AUGUST 12, 1931.

(28,440)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 485.

ST. LOUIS MALLEABLE CASTING COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE G. PRENDERGAST CONSTRUCTION COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 25, 1921.

1 UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it remembered that, heretofore, and on the second day of July, 1919, there was filed in the office of the clerk of the Supreme Court of the State of Missouri, in a cause between St. Louis Malleable Casting Company, a Corporation, Appellant, and The George G. Prendergast Construction Company, a Corporation, Respondent, No. 21,710, a certified transcript of the judgment of the Circuit Court of the City of St. Louis, and of the order of said circuit court granting an appeal from said judgment to the Supreme Court of the State of Missouri, which said transcript of said judgment and of said order granting an appeal is in the words and figures following, to-wit:

2 STATE OF MISSOURI,
City of St. Louis, ss:

Be it remembered, that heretofore, to-wit: at the June Term, Nineteen Hundred and Eighteen, of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the fifth day of June, 1918, it being the Third day of the June Term, 1918, of said Court, the following proceedings were had in cause No. 10468, Series "B" of the causes in said Court, wherein St. Louis Malleable Casting Company (a corporation) is plaintiff and The George G. Prendergast Construction Company, a corporation is defendant, to-wit:

Wednesday, June 5th, 1918.

10468-B.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corporation,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY.

Now at this day come again parties hereto and the trial of this cause is resumed and progressed; and being finished, said cause is submitted to the Court upon the pleadings, the evidence and the proof adduced; and the Court not now being sufficiently advised in the premises, takes time to consider thereof.

And afterwards, to-wit; at the December Term, 1918 and on December 30th, 1918, it being the 18th day of the December
3 Term 1918, of said Court, the following further proceedings were had in said cause, towit:

Monday, December 30th, 1918.

10468-B.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corporation,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, a Corporation.

This cause having heretofore been tried by the Court, and having on the 5th day of June, 1918, been by the parties hereto submitted to the Court, upon the pleadings and upon the evidence and proof then and theretofore adduced, and having been taken under advisement; and the Court being now fully advised in the premises, doth find in favor of the defendant on the issues joined, and doth find that the plaintiff is not entitled to the relief prayed for in its amended petition.

Wherefore, it is ordered, adjudged and decreed by the Court, that the plaintiff take nothing by its suit herein, that its bill herein be*m* a*b*d the same is hereby dismissed, and that the defendant be discharged and go hence without day and recover of plaintiff the costs of this proceeding, and have therefor execution.

And afterwards, to-wit; at the February Term, 1919 of said Court, the following further proceedings were had in said cause, to-wit:

Monday, March 24th, 1919.

10468-B.

ST. LOUIS MALLEABLE CASTING COMPANY

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY.

4 No*t* at this day comes the plaintiff by its attorney and files and presents to the Court an affidavit for appeal, and a*n*d appeal bond, in the sum of $250 with Charles G. Ette and Henry Luedinghaus, Jr., as sureties, and prays an appeal in the above entitled cause; and the Court having seen and examined said affidavit and bond, doth order that said bond be approved, which is done; and that an appeal be, and is hereby allowed the plaintiff to the Supreme Court of the State of Missouri, from the judgment or decision of the Court, heretofore rendered herein.

STATE OF MISSOURI,
City of St. Louis, ss:

I, Nat Goldstein, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, do hereby certify, that

the above and foregoing, contains a full, true and complete transcript of the judgment in the above entitled cause, showing the term, day of the term, month and year in which the same was rendered, and also, of the order granting and appeal in said cause, as fullu as the same remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, the 2nd day of June, 1919.

NAT GOLDSTEIN,
Clerk Circuit Court.

[SEAL.]

5 And thereafter, and on the 20th day of November, 1920, there was filed in said cause the Appellant's Abstract of the Record, which said abstract is in the words and figures following, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1920.

No. 21710.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corporation, Appellant,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, a Corporation, Respondent.

Appeal from the Circuit Court, City of St. Louis, Missouri.

Honorable Wilson A. Taylor, Judge.

APPELLANT'S ABSTRACT OF RECORD.

This cause was instituted in the Circuit Court of the City of St. Louis, Missouri, on the 19th day of May, 1917, and thereafter, on the 2nd day of April, 1918, plaintiff, by leave of Court, filed its amended petition herein, said amended petition being in words and figures as follows (omitting caption and signature), to wit:

6 *Amended Petition.*

Plaintiff, for its amended petition, filed by leave, states that it and the defendant are and at the times hereinafter stated were corporations duly organized and existing under and by virtue of the laws of the State of Missouri.

Plaintiff further states that at all times hereinafter mentioned the City of St. Louis was a municipal corporation organized under the Constitution and laws of the State of Missouri, with a special charter adopted by vote of its people pursuant to authority of the Constitution of said State, and which charter went into effect on the 29th day of August, 1914. That said City of St. Louis has a Board of Public

Service authorized by said charter, and that the legislative powers of said city, subject to certain limitations and restrictions in said charter contained, are vested in a Board of Aldermen.

Plaintiff further states that the said Board of Aldermen did, upon recommendation of the said Board of Public Service, adopt an ordinance numbered 27890, entitled, "An Ordinance to Establish a Sewer District to Be Known as 'Baden Sewer District Number Two'," which ordinance was approved by the Mayor of said city on March 22, 1915. That the said ordinance numbered 27890 established a sewer district to be known as "Baden Sewer District Number Two," with certain boundaries, the said ordinance being in words and figures as follows, to wit:

"An Ordinance to Establish a Sewer District, to be Known as 'Baden Sewer District Number Two'."

"Be it ordained by the City of St. Louis as follows:

7 "Section 1. There is hereby established in the City of St. Louis a sewer district to be known as 'Baden Sewer District Number Two', bounded as follows, to wit: Beginning at the intersection of the west line of Broadway with the center line of Calvary avenue east of Broadway produced, thence eastwardly along the said produced center line and said center line to the center line of the Wabash Railroad Company's right-of-way, thence northwardly along said center line to its intersection with a line twenty-five feet north of and parallel to the south line of Thatcher avenue, thence eastwardly along the said line to its intersection with a line forty feet east of and parallel to the west line of the right-of-way of the St. Louis water works conduit, thence northwardly along the said line to a point two hundred and fifty-eight feet four inches (measured along the said line produced) southwardly from the south line of Christian avenue (thirty feet wide) produced, thence westwardly with an angle of eighty-eight degrees, forty-six minutes and forty-eight seconds to the left, a distance of nine and nineteen-hundredths feet, thence northwestwardly along a curve to the right with a radius of one hundred and ninety-one and three-hundredths feet to its intersection with a line fifty feet west of and parallel to the west line of the right-of-way of the St. Louis water works conduit, thence southwardly along the said line to the south line of lot number three of Thatcher's subdivision, thence westwardly along the said line and the south line of lot number two of said subdivision to its intersection with a line seven feet six inches east of and parallel to the west line of lot number two of said subdivision, thence northwardly along the said line to the south line of Christian avenue (thirty feet
8 wide), thence eastwardly along the said line to a point one hundred and sixty-seven and forty-seven hundredths feet west of the west line of the right-of-way of the St. Louis water works conduit, thence northwardly at right angles to the above line to the center line of Christian avenue (thirty feet wide), thence eastwardly along the said center line to the center line of San Juan avenue (forty feet wide), thence northwestwardly along the said center line

to the center line of Thrush avenue (thirty feet wide), thence westwardly along the said center line to its intersection with a line through a point in the east line of Broadway six hundred and forty and thirty-eight hundredths feet north of the south line of Christian avenue (measured along said east line of Broadway, and making an angle with the said east line, going northwardly, of eighty-five degrees and forty-two minutes to the left), thence westwardly along the above-mentioned line to a point fifteen and forty-seven-hundredths feet west of the west line of Broadway, thence westwardly along a curve to the left with a radius of one hundred and twelve and sixty-one-hundredths feet, and an angle of thirty-seven degrees and fifty-eight minutes, thence southwestwardly along the tangent of the above-mentioned curve a distance of two hundred and sixty-six and eighteen-hundredths feet, thence southwestwardly along a curve to the left with a radius of one hundred and seventy feet, and an angle of eight degrees and eighteen minutes, thence southwestwardly along the tangent to the above curve to its intersection with the east line of lot number nine of Railroad Addition to Germantown, thence southeastwardly along the said line to the south line of said lot number nine, thence southwestwardly
9 along the said line and the said line produced to its intersection with the center line of the Wabash Railroad Company's track as originally constructed, thence southeastwardly along the said line to a point eight hundred feet (measured along the said center line of the Wabash Railroad Company's track) northwestwardly from the west line of Broadway, thence southwardly along a line parallel to said west line of Broadway to its intersection with the west line of the Wabash Railroad Company's right-of-way, thence southeastwardly along the said line to the west line of Broadway, thence southwardly along the said line to the point of beginning. The exact boundaries of said sewer district, as described herein, are shown upon a plat of said sewer district on file in the office of the Board of Public Service, which said plat is marked 'Baden Sewer District No. 2,' and was approved by the Board of Public Service on the 17th day of November, 1914, and is hereby confirmed with like effect as if said plat were incorporated herein and made a part hereof.

"Approved March 22nd, 1915."

That thereafter the Board of Aldermen of said city did enact an ordinance, prepared and recommended by the Board of Public Service of said city, afterwards known as ordinance No. 28167 and entitled "An Ordinance to Provide for the Construction of Sewers in Baden Sewer District Number Two, and to Accept Certain Private Sewers Deeded to the City of St. Louis by the St. Louis Terminal Railway Company, and to Incorporate Two Lines of Said Private Sewers in Said District Sewers," which ordinance was approved July 21, 1915. That by the said ordinance No. 28167
10 the Board of Public Service was authorized and directed to let a contract for the construction of district sewers within such Baden Sewer District No. 2 as established by said ordinance

No. 27890, with all lateral sewers, inlets, manholes, junctions and other appurtenances necessary to render said sewers complete and efficient; and said ordinance further provided for the acceptance by the City of St. Louis of sewers conveyed to said city by the St. Louis Terminal Railway Company by deed dated April 13, 1915, and that a part of said sewers so conveyed should be incorporated in the system to be constructed under the authority of said ordinance. That said ordinance further provided that when the sewers were fully completed the Board of Public Service should cause the entire cost and expense thereof to be computed and should levy and assess such cost and expense as a special tax in accordance with the requirements of Article XXII of the Charter of the City of St. Louis and should cause to be issued a special tax bill against each lot or parcel of ground liable, in the manner provided by Article XXIII of the Charter of the City of St. Louis or by ordinance not inconsistent therewith. That said ordinance further appropriated out of the public revenue, out of the real estate account for proportion of cost against property payable by the city, the sum of seven hundred dollars, to pay the city's proportion of the cost of the construction of the said sewers which would have been assessed against property owned by the city located in said sewer district, were it not exempt from assessment. The said ordinance is in words and figures as follows, to wit:

11 "An ordinance to provide for the construction of sewers in Baden Sewer District Number Two, and to accept certain private sewers deeded to the City of St. Louis by the St. Louis Terminal Railway Company, and to incorporate two lines of said private sewers in said district sewers.

"Be it ordained by the City of St. Louis, as follows:

"Section 1. The Board of Public Service is hereby authorized and directed to let a contract for the construction of district sewers within Baden Sewer District Number Two, as established by ordinance number twenty-seven thousand eight hundred and ninety, with all lateral sewers, inlets, manholes, junctions and other appurtenances necessary to render said sewers complete and efficient.

"Sec. 2. The sewers conveyed to the City of St. Louis by the St. Louis Terminal Railway Company by deed dated the thirteenth day of April, nineteen hundred and fifteen, and recorded in book number two thousand eight hundred and forty-five, page twenty-nine, of the records in the office of the Recorder of Deeds for the City of St. Louis, are hereby accepted, and a part of said sewers, to wit, a certain line extending along Broadway between Blase avenue and East Railroad avenue and a certain line extending along East Railroad avenue from Broadway to a point about eighty-five feet south of the south line of Antelope street, as shown on the preliminary plans for the district sewers hereby authorized, shall be incorporated in the system to be constructed under the authority of this ordinance.

"Sec. 3. Said sewers shall be constructed in the manner and subject to the regulations prescribed in the general ordinances
12 and the Charter of the City of St. Louis, and shall be of the sizes and lengths as follows:

"About three thousand eight hundred feet in length of sewers twelve inches inside diameter.

"About eight hundred feet in length of sewers fifteen inches inside diameter.

"About one thousand seven hundred feet in length of sewers eighteen inches inside diameter.

"About one thousand and ninety feet in length of sewers twenty-one inches inside diameter.

"About six hundred and thirty feet in length of sewers twenty-four inches inside diameter.

"About three hundred and seventy feet in length of sewers twenty-seven inches inside diameter.

"About one thousand and seventy-five feet in length of sewers thirty inches inside diameter.

"About four hundred and twenty feet in length of sewers thirty-three inches inside diameter.

"About four hundred and twenty feet in length of sewers thirty-nine inches inside diameter.

"About four hundred and fifteen feet in length of sewers forty-five inches inside diameter.

"About four hundred and seventy-three feet in length of sewers forty-eight inches inside diameter.

"About one thousand one hundred and ninety-six feet of sewers fifty-four inches inside diameter.

"About three hundred and twenty-eight feet in length of sewers fifty-seven inches inside diameter.

"Said contract shall be let by the Board of Public Service after the receipt of bids. Said bids shall be received in the alternative upon the following two proposals or methods for doing the work:

13 "First. For the construction of all sewers of thirty-three inches or less inside diameter of vitrified clay pipe, and for the construction of sewers of greater inside diameter than thirty-three inches of brick laid in Portland cement mortar.

"Second. For the construction of all sewers of thirty-three inches or less inside diameter of vitrified clay pipe and for the construction of all sewers of greater than thirty-three inches inside diameter of two-ring segment block made of vitrified tile.

"Bids shall be received by the board from contractors upon either or both of said proposed methods separately, and the contract shall be awarded to the lowest responsible bidder, irrespective of which proposed method said bid may be based upon. The final detailed plans and specifications shall be drawn as to clearly indicate the plan of construction applicable to each of said proposed methods.

"Sec. 4. Said district sewers are to be constructed of the sizes aforesaid upon the route shown by preliminary plans approved by the Board of Public Service on the fifteenth day of June, nineteen hun-

dred and fifteen, subject to such changes as may be made in the final detailed plans, and said district sewers are to be constructed in accordance with details, plans and specifications to be finally adopted and approved by the Board of Public Service before bids are advertised therefor.

"Sec. 5. When the said district sewers with their laterals, inlets, manholes, junctions and other appurtenances are fully completed, the Board of Public Service shall cause the entire cost and expense thereof to be computed and shall levy and assess such cost and expense as a special tax, in accordance with the requirement of
14 Article XXII of the Charter of the City of St. Louis, and shall cause to be issued a special tax bill against each lot or parcel of ground liable, in the manner provided by Article XXIII of the Charter of the City of St. Louis, or by ordinance not inconsistent therewith; provided, however, that the special tax bills above directed to be issued shall be divided into five equal parts, payable and collectible as provided in Article XXIII of the Charter of the City of St. Louis.

"Sec. 6. Whereas, in Baden Sewer District Number Two there is located a portion of the Water Works Conduit, property of the City of St. Louis, which is not liable to special assessment; and whereas, the proportion of the cost of the aforesaid construction of sewers which would have been assessed against said property were it not exempt from assessment is estimated to be seven hundred dollars, there is hereby appropriated and set apart out of the Real Estate Account for proportion of cost assessed against property payable by the city, the sum of seven hundred dollars to pay for the city's proportion of said cost.

"Approved July 21st, 1915."

Plaintiff further alleges that the defendant was awarded the contract for the construction of the said district sewer and did enter into a contract in writing with the said The City of St. Louis, for the doing of the said work. That on the 22nd day of December, 1916, the said City issued and delivered to the defendant special tax bills for the aggregate amount of $65,744.67, being the entire cost of the construction of said sewer, as calculated by the said Board of
15 Public Service, and as agreed upon in the contract between the said City and defendant and as authorized by the said charter and ordinances, amongst which bills was one issued against the property of the plaintiff hereinafter particularly described, and which bill purports to confer upon the holder thereof a lien authorized by the Charter of said City of St. Louis for the amount of said tax bill, to wit, $9,168.86, the said tax bill being numbered 27701.

Plaintiff further states that it is the owner in fee of the tract of land described in said tax bill and against which said tax bill was issued and upon which said tax bill is a lien, said land being situated in the City of St. Louis, in the State of Missouri, and described as follows, to wit:

"Lot two (2) and the south part of lot one (1) of Merchants' Bank Subdivision in the Thatcher tract and in City Blocks 4231-E and 4230, having an aggregate frontage on the north line of Thatcher avenue of five hundred ninety-four (594) feet, more or less, by a depth along the west line of waterworks conduit right-of-way of five hundred fifty-eight and 85.100 (558.85) feet; bounded north by property of the St. Louis Terminal Railway Company, east by the said right-of-way, south by Thatcher avenue, and west by the east line of City Block 4231 west and other property; the said tract containing approximately 320,210 square feet."

Plaintiff further alleges that the said assessment and charge in the said tax bill is excessive, unlawful and void; for the reason that the said taxing district established by the ordinance aforesaid, does not include large areas of land which are in the drainage
16 area of the said sewer and which properties stand in the same relative position as plaintiff's with respect to the said sewer and derive, and are so situated as to be capable of deriving, the same amount of benefit from the said sewer as the property of plaintiff.

That a large tract of land immediately north of plaintiff's said property and constituting lots two and three of City Blocks 4231-E and 4230 of said City of St. Louis, hereinafter referred to as the "Kuhs" property and containing approximately the same area as plaintiff's property, and which property is so situated with respect to the said sewer as to receive as great or greater benefit therefrom than the said property of plaintiff, was omitted from the said taxing district and exempted from taxation for any portion of the cost of the construction of said sewer. That a large tract of land fronting on the west side of Broadway and belonging to the Calvary Cemetery Association, and which property consists of a number of acres and is in the natural drainage district of said sewer, and which property is in the same relative position with respect to said sewer as the property of plaintiff and derives as great benefit therefrom, was also omitted from the said taxing district and exempted from the payment of any portion of the cost of construction of said sewer. That by reason of the omission and exemption of the said large tracts of land from their just share of the said tax to pay the cost of construction of said sewer, an unreasonable and excessive proportion of the said tax has been assessed aaginst the said property of the plaintiff.

Plaintiff further states that the ordinances aforesaid and
17 the provisions of the Charter of the City of St. Louis purporting to authorize the Board of Aldermen to establish a sewer district designating lands of private owners to be specially taxed to pay the entire cost of said sewer, violate the Fourteenth Article of the Amendments of the Constitution of the United States, in that they determined that said lands within the district prescribed by said ordinances would be benefited by said sewer and should be and were specially assessed therefor, as well as the apportionment of said tax as between the several lots or parcels of land and their respective owners within said district, without any hearing being

accorded the owners of said land upon such determination, thereby denying plaintiff due process of law; and plaintiff further says that by the establishment of said sewer district and the imposition of the entire cost of said district sewer upon the property therein as ordained by the ordinance aforesaid, and by the exclusion of the lands, as aforesaid, from taxation for the cost of said sewer, although such lands so excluded will be drained by said sewer and share equally with the property of plaintiff and other properties in said defined district in the benefits resulting from the construction of said sewer, plaintiff has been denied due process of law, and the equal protection of the laws guaranteed to plaintiff by the said Fourteenth Article of the Amendments to the Constitution of the United States.

That the establishment of said sewer district and levying of said tax by the ordinance aforesaid was and is arbitrary, unjust, oppressive and fraudulent, and by the said Board of Public Service known to be so at the time of its recommendation of said ordinance
18 to the said Board of Aldermen, in that the said Board of Public Service then knew that the aforesaid additional parcels of land would be drained by the said sewer and derive all of the benefits and advantages therefrom which any of the property within the said defined sewer district can or will derive therefrom, and notwithstanding which, the ordinances so recommended by said Board of Public Service to said Board of Aldermen and by the latter enacted impose the whole cost of said sewer upon the land within the said sewer district as defined in the said ordinance, and no part of said cost upon such additional lands.

That the Board of Public Service in recommending to the Board of Aldermen the said ordinance establishing said district acted oppressively, arbitrarily and fraudulently, in this: That, prior to the establishment of said sewer district, and prior to the construction of said district sewer, plaintiff had, under permit of the then Board of Public Improvements of said city, the predecessor of said Board of Public Service, constructed a sewer system upon its said land, which private system was laid from plaintiff's said property, along a private right-of-way, to a public sewer of said city, known as the Baden Public Sewer, with which sewer said private sewer of plaintiff was connected. That plaintiff had constructed the said private sewer, under a permit as aforesaid, at great cost and expense, and said private sewer was fully adequate for taking care of the sewage and surface water from plaintiff's said land. That plaintiff's said property has no dwelling buildings upon it, the only buildings erected upon its land being foundry, factory and office buildings occupied and used by it in the transaction of its business. That the tract of land herein-
19 above mentioned, designated the "Kuhs" property, and which has been excluded from said taxing district, as aforesaid, is and has been improved for a number of years by a large number of tenement and flat buildings occupied by more than forty families. That prior to the establishment of said taxing district and the construction of said district sewer, a short line of private sewer, for carrying off foul water, had been laid in said "Kuhs" property and was

connected with the plaintiff's private sewer above mentioned, and the sewage from said "Kuhs" property thus drained through plaintiff's said private sewer into said Baden Public Sewer. That the said private sewer on plaintiff's land and extending from there along the said private right-of-way and connected with said Baden Public Sewer is still used for the carrying off of foul and surface water from plaintiff's said land and of foul water from the said "Kuhs" property. That, in the planning of said district sewer, it was provided for the laying of a line of said sewer along and upon a strip seven and one-half feet in width, being the western seven and one-half feet of said "Kuhs" property extending southwardly from the south line of Christian avenue, and it was further provided in said plans for the laying of a line of said district sewer upon and along a strip, being the western ten feet in width of plaintiff's property hereinabove described and extending southwardly from the south line of Antelope street to the north line of Thatcher avenue, a distance of four hundred and ninety-five feet, more or less.

That the City of St. Louis obtained from plaintiff, without any consideration moving to plaintiff therefor, a deed conveying the easement or right-of-way for said district sewer along and
20 upon the said strip ten feet in width. That said city also obtained a conveyance from the owners of said "Kuhs" property for the easement or right-of-way for said district sewer in said strip seven and one-half feet in width of said "Kuhs" property. That the deeds for the said sewer right-of-way recite a nominal consideration of $1.00. That, notwithstanding the deed to the sewer right-of-way along said "Kuhs" property purported to be a conveyance in consideration of the sum of $1.00, the Sewer Commissioner of the City of St. Louis, who is also a member of the Board of Public Improvements of said city, did, without authority and unlawfully, promise the owners of said "Kuhs" property that, because of the making of said deed to said right-of-way, the taxing district for the said Baden District Sewer Number Two should be so laid out and said district sewer so constructed that the said "Kuhs" property, although receiving all of the benefits of said district sewer, and being, with respect to said sewer, in substantially the same position as plaintiff's property, should be left out of said taxing district and exempted from the payment of any portion of the cost of the construction of said district sewer. That the value of the sewer right-of-way upon said strip of said "Kuhs" property was trifling as compared with the proportion of the cost of said sewer property and equitably taxable against said property. That the said Sewer Commissioner in planning and laying out the taxing district for said district sewer, acted arbitrarily and with a view of favoring the owners of said "Kuhs" property and did so plan said district as to leave out of said taxing district all of the said "Kuhs" property, being said lot 2 of block 4231-E and
21 lot 3 of block 4230, except a strip, being the western seven feet six inches in width of said "Kuhs" property and a strip fifty feet in width off the eastern part of said land, extending from the center line of the Baden Public Sewer to the southern boundary line of said "Kuhs" property. That the said two strips of said

"Kuhs" property were left in the taxing district for the fraudulent purpose of permitting the connection of said "Kuhs" property with the said district sewer, owing to the fact that said strips are immediately adjacent to pipes of said district sewer, thus make it possible for the remainder of said "Kuhs" tract, eliminated from said taxing district as aforesaid, to obtain all of the benefits and advantages of said district sewer. That the said sewer Commissioner did report to the said Board of Public Improvements and to the committee of said board having under consideration the establishment of said taxing district, his said unlawful arrangement with the owners of said "Kuhs" property to so define said district as to eliminate substantially all of said "Kuhs" property, and did fully inform the other members of said board and of the said committee of said board that the said proposed elimination of said property from the taxing district was probably unlawful and might invalidate the tax bills issued for the construction of said sewer. That, notwithstanding the said report of said Sewer Commissioner, and notwithstanding the members of said Board of Public Improvements did fully understand that the plan for said taxing district as submitted by the Sewer Commissioner was unjust, inequitable and invalid, the said Board of Public Improvements as a committee of the whole, did arbitrarily, fraudulently and oppressively, and in a spirit of favoritism
22 towards the owners of said "Kuhs" property, recommended the establishment of said taxing district with the elimination of substantially all of said "Kuhs" property as aforesaid and the said Board of Public Improvements did then, at the regular meeting of said board, adopt the recommendation of the committee of the whole of said board, and did prepare and recommend to the Board of Aldermen of said City of St. Louis the ordinance establishing said taxing district, arbitrarily and fraudulently leaving out of the taxing district as defined in the ordinance so recommended to the Board of Aldermen, the said "Kuhs" property, with the exception of the two small strips hereinbefore specified. That the Board of Aldermen of said City of St. Louis did, without any hearing being accorded to the property owners in said proposed taxing district, and without any independent investigation of the facts, but acting solely upon the recommendation of said Board of Public Service as hereinbefore set forth, enact the said ordinances as aforesaid.

That the said Board of Public Service in recommending to the Board of Aldermen the said ordinance establishing said taxing district, did further act oppressively, arbitrary and fraudulently in this: That, although a large part of the tract of land belonging to the Calvary Cemetery Association, fronting on the west side of Broadway, is in the drainage territory of said district sewer, and the said district sewer has been constructed in Broadway along and in front of said Calvary Cemetery, none of the land belonging to the said Calvary Cemetery Association was included in said taxing district. That although it was originally planned by the Sewer Commissioner and by the Board of Public Improvements
23 of said city that the portion of said Calvary Cemetery within the natural drainage district of said sewer should be in-

cluded in said taxing district, the said Board of Public Improvements, sitting as a committee of the whole of said board, did consider the request of said Calvary Cemetery Association that its property be wholly excluded from the proposed taxing district, and, although it was understood by the members of said Board of Public Improvements, and it was stated by a number of the members thereof at such meeting, that the board was without legal authority to omit said property from said taxing district and that the omission of said property from said taxing district would probably invalidate the taxbills which the city would issue for the cost of constructing the district sewer, yet the said Board of Public Improvements, as a committee of the whole, did in order to favor said Calvary Cemetery Association, arbitrarily and fraudulently adopt a plan for said taxing district, from which the property of said Calvary Cemetery Association was eliminated, and the Board of Public Service acting upon the said recommendation did thereupon adopt and recommend to the Board of Aldermen of said City of St. Louis the ordinance aforesaid, establishing said taxing district, whereby the property of said Calvary Cemetery Association was left out of said taxing district and exempted from taxation for said district sewer, the board in so doing acting arbitrarily, oppressively and fraudulently as aforesaid. That the said Board of Aldermen of said City of St. Louis made no independent investigation of the facts upon which the said proposed ordinance was based, but did enact
24 the said ordinance in sole reliance upon the said recommendations of the Board of Public Service.

That the said special taxbills are unlawful and void for the further reason that the charter of the City of St. Louis prescribed a rule for the establishment of the district in which the cost of construction of a district sewer is to be assessed, without regard to any consideration of the difference in benefits conferred upon the real estate coming within such arbitrarily defined district. That the said provisions of the charter of the City of St. Louis are arbitrary and unreasonable and result in the distributing of such tax in grossly unequal proportions, and that the said tax was under the said charter provisions and the ordinance enacted in pursuance thereto mechanically apportioned as hereinbefore set forth, by assessing the whole cost of said sewer as a special tax against all of the lots or parcels of ground in said sewer district in the ratio that each parcel and lot of ground bears to the area of the whole district, exclusive of the area of streets, avenues, public highways and alleys, without any consideration of the benefits, if any, conferred upon the land so taxed. That the said charter provisions and the said ordinance are violative of the Fourteenth Amendment to the Constitution of the United States, in that they deny to plaintiff the equal protection of the laws and constitute a taking of plaintiff's property without due process of law and without adequate compensation.

That said special taxbill is unlawful and void in that the assessment and levy of said tax upon plaintiff's property amounts to confiscation thereof for public use and constitutes taking prop-
25 erty without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States,

and in violation of Sections 20 and 30 of Article II of the Constitution of the State of Missouri.

Plaintiff further states that by the terms of the charter of the City of St. Louis said special taxbill is now a lien on the property of the plaintiff hereinbefore described and will be a cloud upon plaintiff's title to said land and will damage and injure plaintiff's title thereto and the value of said land.

Plaintiff further states that it has no adequate remedy at law in the premises, but can only have proper and adequate relief in a court of equity, where all such matters are promptly cognizable. That unless defendant is enjoined and restrained from collecting and enforcing said special tax bill against plaintiff's property, and the cloud of said tax bill removed from said property, plaintiff will suffer irreparable injury.

Wherefore, the premises considered, plaintiff prays that the Court may declare said special tax bill numbered 27701 void and of no effect; that defendant be forever enjoined and restrained from transferring and collecting said special tax bill, and that the same be ordered cancelled and delivered into court by defendant, and that the lien thereof on all of plaintiff's said property be forever discharged; and for such other and further relief in the premises as to the Court may seem meet and proper.

And thereafter, on the 3rd day of October, 1917, defendant, by leave of Court, filed its answer to plaintiff's amended petition, which answer is in words and figures as follows (omitting caption and signature):

26 *Answer.*

"Now comes defendant The George G. Prendergast Construction Company and for its answer herein admits that it is the owner of the special tax bill mentioned in the petition, but denies each other allegation of the petition and prays to be dismissed hence with its costs."

And thereafter, on the 4th day of June, 1918, at the June Term, 1918, said cause came on for hearing before Honorable Wilson A. Taylor, and said trial not being finished on said day, was laid over until the 5th day of June, 1918, on which day said trial was finished and the cause submitted to the Court and taken under advisement by the Court until the 30th day of December, 1918, in the December Term, 1918, of said court, when the Court entered its finding and judgment for defendant and dismissed plaintiff's bill.

And thereupon, and within four days thereafter, and at said December Term, 1918, to wit, on the 3rd day of January, 1919, plaintiff filed its motion for a rehearing; which motion (omitting caption and signature thereto) is in words and figures as follows, to wit:

Motion for Rehearing.

Comes now the plaintiff in the above-entitled cause and moves the Court to set aside the finding and judgment in favor of defendant

and dismissing plaintiff's bill, and to grant plaintiff a rehearing, and as grounds for said motion states:

1. That the finding and judgment of the Court is against the law, the evidence and the weight of the evidence.

27 2. That under the law and the evidence the judgment and finding should have been in favor of plaintiff and against defendant.

3. That under the law and the evidence the Court should have found in favor of the plaintiff and against the defendant, and have rendered a decree in favor of plaintiff, ordering the cancellation of the special tax bill and assessment which plaintiff by its petition prays to have canceled.

4. That the Court erred in excluding, upon the objection of defendant, competent and relevant evidence offered by plaintiff.

5. That the Court erred in admitting, over the objection of the plaintiff, incompetent and irrelevant evidence offered by defendant.

6. That the Court erred in refusing to declare void the special tax bill described in the petition, and erred in refusing to grant the plaintiff a decree canceling the said tax bill and enjoining defendant from transferring or attempting to collect the same.

7. That under the law and the evidence the tax bill described in the petition is unlawful and void, for the reason that the ordinance establishing the sewer district upon which the tax for the construction of Baden District Sewer No. 2 was levied, is arbitrary, unjust, oppressive and fraudulent.

8. Because the said tax bill is unlawful and void for the reason that the Charter of the City of St. Louis, under authority of which said tax bill was issued, prescribes a rule for the establishment of the taxing district for private sewers without regard to any con-
28 sideration of the difference in benefit conferred upon the real estate coming within such arbitrarily defined district. That the said provisions of the Charter of the City of St. Louis are arbitrary and unreasonable and result in the distributing of such tax in grossly unequal proportions. That said charter provisions and the ordinance enacted in pursuance thereto, and by authority of which the tax bill described in the petition was issued, are violative of the Fourteenth Amendment to the Constitution of the United States, in that they deny to plaintiff the equal protection of the laws and constitute a taking of plaintiff's property without due process of law and without adequate compensation.

9. Because said special tax bill is unlawful and void, and the assessment and levy of said tax upon plaintiff's property amounts to confiscation thereof for public use, constitutes the taking of property without due process of law, violates the Fourteenth Amendment of the Constitution of the United States, and violates Sections 20 and 30 of Article II of the Constitution of the State of Missouri.

10. That the ordinance establishing the taxing district upon which the special tax bill described in the petition was based, is invalid because no notice or opportunity to be heard upon the establishment of said taxing district was given plaintiff, in violation of the provisions for due process of law of the Constitution of the United States and of the State of Missouri.

11. That the Court erred in not finding under the evidence that the Board of Public Service of the City of St. Louis, in recommending the ordinance establishing the benefit district upon which
29 the tax bill described in the petition was based, and the Board of Aldermen of said city in enacting said ordinance, acted arbitrarily and fraudulently in law.

And thereafter, on the 17th day of March, 1919, and at the February Term, 1919, said motion for a rehearing was by the Court overruled; to which action of the Court in overruling said motion plaintiff then and there duly excepted.

And thereafter, and during the same term, on the 24th day of March, 1919, plaintiff filed its affidavit for an appeal, in words and figures as follows (omitting caption), to wit:

Affidavit for Appeal.

"Lambert E. Walther, attorney and agent for St. Louis Malleable Casting Company, a corporation, plaintiff and appellant above named, in its behalf being duly sworn, makes oath and says, that the appeal prayed for in the above-entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the Court."

That an appeal was thereupon on said 24th day of March, 1919, allowed plaintiff to the Supreme Court of Missouri and plaintiff filed and the Court approved an appeal bond.

And thereafter, on the 9th day of September, 1920, and at the June Term, 1920, of said court, the plaintiff presented its bill of exceptions, and the same was allowed, signed, sealed, made a part of the record, and filed, said bill of exceptions being in words and figures (omitting caption) as follows:

30 BILL OF EXCEPTIONS.

Be it remembered, That at the June Term, 1918, of said Circuit Court, and on Tuesday, the 4th day of June, 1918, the above-styled cause came on to be tried and was tried before the Honorable Wilson A. Taylor, Judge of said Circuit Court, presiding in Division No. 2 thereof, the parties appearing by their respective attorneys, as follows:

Appearances:

Messrs. Muench, Walther & Muench, for the plaintiff.
A. R. Taylor, Esq., for the defendant.

Plaintiff's Evidence.

LEO OSTHAUS, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Walther:

Q. What is your name?
A. Leo Osthaus.
Q. What official position with the City of St. Louis do you hold?
A. The assessor of special taxes.
Q. You have been in the special tax department how many years?
A. Since 1886 in the department.
Q. You are a civil engineer by profession?
A. No, sir.
Q. Have you in your custody as assessor of special taxes the original plat of the taxing district for the Baden District Sewer Number Two?
A. Yes, sir.
31 Q. And have you brought it with you in response to a subpœna?
A. Yes, sir.
Q. Will you turn to the plat—I will ask you if you can tell us from the plat first what the total area in square feet of the taxing district is?
A. The total area east is 2,296,039 square feet.

Mr. Taylor:

Q. That includes the taxing district as it was laid out?
A. Yes, sir.

Mr. Walther (resuming examination):

Q. And your plat also shows, does it, the total contract price for the construction of Baden District Sewer Number Two?
A. Yes, sir.
Q. And how much was that?
A. Sixty-five thousand, seven hundred and forty-four dollars and sixty-seven cents.
Q. So that made the rate per hundred square feet upon the district as it was laid out and assessed, what?
A. Two dollars, decimal point, eighty-six thousand three hundred and thirty-nine, per hundred square feet.
Q. Does that plat show the number of hundred square feet in the property of the St. Louis Malleable Casting Company in city block 4231 east?
A. Yes, sir, and 4230.
Q. What is the total area of the Casting Company's property, as shown on this tax plat?

A. Three hundred and twenty thousand, two hundred and ten square feet.

Q. The total amount of the assessment against the St. Louis Malleable Casting Company's property for this sewer was how much?

A. Nine thousand one hundred and sixty-eight dollars and eighty-six cents.

Q. Mr. Osthaus, I will get you to look at this blue print, which I think was prepared in your office, and I will ask you whether or not——

32

The Court (interrupting): This is only one part?

A. Yes, sir.

The Court:

Q. How many plats are there containing all of the sewer district?

A. Three.

Mr. Walther (resuming examination):

Q. Will you look at this blue print and tell us whether or not that is a copy of the taxing district, that is the red line outlined there?

A. Yes, sir.

Q. That blue print came from your department?

A. No, sir; this was made by the Sewer Department.

Q. Now, Mr. Osthaus, this plat or blue print, about which I have just asked you, which I will have the stenographer mark "Exhibit A," shows in reduced size, does it not, the data shown on the three plats which you have brought into court and which are the originals of this blue print?

A. Yes, sir; the boundary of the district.

Q. Mr. Osthaus, the property shown here in blocks forty-two hundred and thirty-one east and forty-two hundred and thirty, being lots two and three, were not included in the taxing district as laid out by the board, were they?

A. No, sir; only a part of it.

Q. Now, will you point out to the Court and describe what part of that property in these two blocks of the so-called Kuhs property was included in the taxing district?

A. Between the red line here (indicating) and the west line here (indicating) of the——

The Court:

Q. Was that property in the sewer district originally established?

A. Yes, sir.

The Court:

Q. But not in the taxing district?

A. Yes, sir; and another strip here (indicating) seven and one-half feet parallel to the east line of forty-two hundred and thirty-two-B and forty-two hundred and thirty-two-A.

33

Mr. Walter (resuming examination):

Q. That is a strip seven feet in width, which is the western seven feet of this tract of land that was left out, was included in the taxing district?
A. Yes, sir.
Q. There was also a strip only fifty feet in width off the east line of the Kuhs property that was included in the taxing district?
A. Yes, sir.
Q. But the remainder of the Kuhs property was left out of the taxing district?
A. Yes, sir.
Q. The western boundary line of the taxing district as it was laid out is the eastern boundary along Broadway of the Calvary Cemetery, is it not?
A. Yes, sir.
Q. Is the western boundary line of the district coincident with the west line of Broadway?
A. Yes, sir.
Q. So that the sewer district was drawn up right up to the property line of the Calvary Cemetery on the west?
A. Yes, sir.

Mr. Taylor: The sewer district lies east of that?
Mr. Walther: Yes, sir.

Q. It runs from the west line of Broadway east?
A. Yes, sir.
Mr. Taylor: That is right.

Mr. Walther (resuming examination):

Q. Mr. Osthaus, when did the new City Charter go into effect?
A. Nineteen fourteen.
Q. August, 1914?
A. Yes, sir.

The Court:

Q. This sewer was laid out under the new Charter?
A. No, sir; the old Charter.

Mr. Walther (resuming examination):

Q. The ordinance was not passed until after the new Char-
34 ter went into effect and the matter was before the old Board of Public Improvements, and had been for a year or more before the ordinance was finally recommended to the Assembly, but the official action by the board was after the new Charter went into effect?
A. Yes, sir; that is right.
Q. Mr. Osthaus, the lines with little slants off to the side through-

out this entire district indicate, do they not, the lines of the district sewer?

A. Yes, sir; that is the sewer.

Q. These little slants off from the pipe, or from the line indicating the pipe, do those indicate places for connection with the adjacent property?

A. I don't know about that; that don't belong to my department.

Q. You had nothing to do with the laying out of the taxing district?

A. No, sir.

Said blue print, Exhibit "A", was then offered in evidence.

(Here follows blue print, Exhibit A, marked page 35.)

CHART

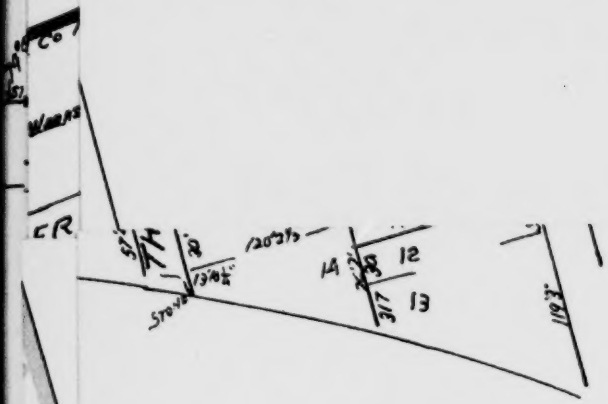
TOO

LARGE

FOR

FILMING

SHEET (1)



(25) STRICT No 2.

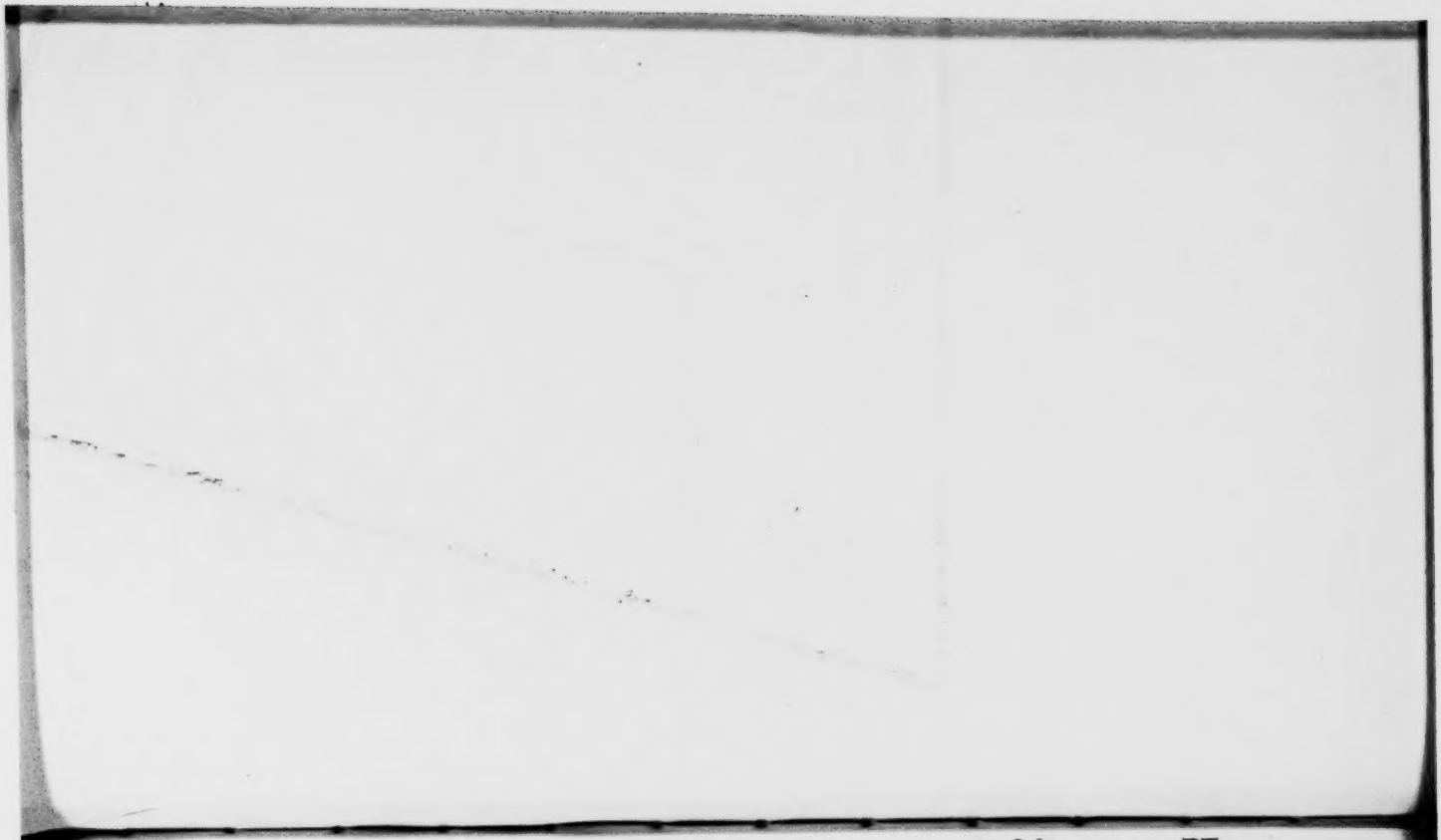
LOUIS.

BOARD OF PUBLIC SERVICE.

VDUI'ESIDENT.

APPROVED

ENGINEER IN CHARGE



Cross-examination.

By Mr. Taylor:

Q. The taxing district as it was laid out did not include the Kuhs property, except the seven and one-half feet on the west line and the fifty feet on the east line?
A. Yes, sir; that is right.
Q. And it did not include Calvary Cemetery?
A. No, sir.

Thereupon by agreement of counsel and consent of Court Mr. Joseph L. Hornsby, a witness for the defendant, was examined out of order as follows:

36 JOSEPH L. HORNSBY, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Taylor:

Q. What is your name?
A. Joseph L. Hornsby.
Q. You are an attorney at law?
A. Yes, sir.
Q. In the time of the construction of the Baden District Sewer Number Two, what connection, if any, did you have with the Calvary Cemetery?
A. I was a member of the Board of Trustees, and also its attorney.
Q. Did you appear before the Board of Public Improvements, I believe they called it, with reference to the claim of the Calvary Cemetery not to be included in the assessment district?
A. I don't think I appeared before the board, but I had a number of conferences with the Sewer Department. I don't recall having appeared before the board itself.
Q. Now, what was the final understanding and agreement between the Sewer Department and the Calvary Cemetery with reference to the inclusion or non-inclusion of the Calvary Cemetery in the sewer district?

Mr. Walther: That calls for Mr. Hornsby's conclusion.

Q. Was the arrangement in writing, Mr. Hornsby?
A. I am not certain whether there was correspondence on the subject or not, but I am rather inclined to think that there were letters passed.

Mr. Taylor (resuming examination):

Q. It was words?
A. I think there were letters, but I am not sure about that; but

method of its construction, so that it would be of a permanent character, and how long those negotiations continued I don't know, but I don't think it was as long as a year.

Redirect examination.

By Mr. Taylor:

Q. Let's see if I can refresh your mind: Wasn't the proposition finally agreed to on May the 8th, 1914?
A. I can't remember the date at all.
Q. Well, wasn't it about that time?
A. I can't say that; I have a very poor memory in particular for dates.
Q. Will you say that you don't remember, then?
A. No, sir; I do not remember that at all.

W. S. RINGO, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Walther:

Q. What is your name?
A. W. S. Ringo.
Q. What position do you hold with the city?
A. Assistant permit clerk in the Sewer Department of the City of St. Louis.
44 Q. The permits are issued by your department and by the department for private sewers, and are recorded in your office?
A. Yes, sir.
Q. Mr. Ringo, were you formerly an inspector in the Sewer Department?
A. Inspector; yes, sir.
Q. Have you brought with you the record book of permits issued by the City of St. Louis to the St. Louis Malleable Casting Company for constructing the private sewer on its plant to the old creek which became the bed of the present Baden Public Sewer?
A. Yes, sir.
Q. Will you kindly get the book containing, first, permit sixty-four thousand two hundred and ninety-three, issued in December, 1903? What is the date of the issuance of that?
A. December 17th, 1903.
Q. And the permit is for the laying of what size pipe?
A. Twelve inches.
Q. From what point to what point?
A. Well, that shows on the plan; that doesn't give it here.
Q. The permit doesn't show that?
A. No, sir.
Q. Did you inspect the work of laying that pipe, Mr. Ringo?

ANTELOPE ST.

CONDUIT AVE.

292'

RIGHT OF WAY FOR SEWER

H.W KUHS

N

BED OF CREEK
(Right of way for sewer)

A. Yes, sir.

Q. You recall, do you not, that the twelve-inch pipe was laid from the property of the Malleable Casting Company to the old creek?

A. Yes, sir.

Q. And that creek afterwards became the site or the bed of the Baden Public Sewer?

A. Yes, sir.

Q. Did you inspect the laying of the pipes within the property line?

A. No, sir.

Q. Of the casting company?

A. No, sir.

45 Q. The paper which you have identified, which is in the book there, is simply a permit authorizing the St. Louis Malleable Casting Company to lay this twelve-inch pipe at the places designated?

A. Yes, sir.

Q. Have you the plat book here, also, which shows where that pipe was laid?

A. No, sir, I haven't the plat book for that one, but I have a right-of-way showing where it was laid.

Q. You have the deed or the right-of-way deed?

A. Yes, sir.

Q. Will you let us see that?

A. Yes, sir.

Q. The paper which you have just handed me is a deed from H. W. Kuhs and wife to the St. Louis Malleable Casting Company giving a right-of-way three feet in width, extending from Antelope street, according to the plat on the deed, to the creek?

A. Yes, sir; through the Kuhs property.

Q. Through the property then owned by W. H. Kuhs?

A. Yes, sir.

Q. And the plat shows that this three-foot right-of-way is off the eastern part or the eastern line of Kuhs' property?

A. Yes, sir.

Q. And that is immediately adjacent to the conduit right-of-way, also called Conduit avenue?

A. Yes, sir.

Q. And you, as inspector for the City of St. Louis, inspected the laying of the pipe along that right-of-way from the Casting Company property to the creek?

A. Yes, sir.

Mr. Walther: I want, in connection with his testimony, to offer this deed in evidence. It is recorded in book 1754, page 42, dated December 9th, 1903.

Said deed was then offered in evidence.

(Here follows blue print marked page 46.)

47 *Deed.*

To whom it may concern:

Know all men by these presents, That we, H. W. Kuhs and —— Kuhs, his wife, and for and in consideration of the sum of one dollar to us in hand paid by the St. Louis Malleable Casting Co., the receipt of which is hereby acknowledged, do hereby give, grant, extend and confer on the aforesaid St. Louis Malleable Casting Co., its heirs, successors or assigns, the right to build and maintain a sewer on the strip of ground as shown on the above plat, and the right-of-way hereby granted is irrevocable and shall continue forever. In witness whereof we have hereunto set our hand- and affixed our seals this — day of ——, A. D. 19—.

H. W. KUHS. [SEAL.]
HANNA KUHS. [SEAL.]

STATE OF MISSOURI,
City of St. Louis, ss:

On this 9th day of December, A, D. 1903, before me appeared H. W. Kuhs and Johanna Kuhs, his wife, and known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and they acknowledged the same to be their free act and deed. In testimony whereof I have hereunto signed my name and affixed my notarial seal in the
48 City of St. Louis the day and year first above written.
[SEAL.] M. H. MURPHY,
Notary Public.

My commission expires Sept. 2nd, 1905.

Filed and recorded December 16th, 1903, at 1:58 p. m.
PAUL YOUNG, JR.,
Recorder.

STATE OF MISSOURI,
City of St. Louis, ss:

I, the undersigned Recorder of Deeds for said city and State, do hereby certify the foregoing to be a true copy of an instrument of writing executed by H. W. Kuhs and wife to St. Louis Malleable Casting Co., together with acknowledgment and date of filing and recording thereof, as the same remains of record in my office in book 1754, page 42.

Witness my hand and official seal this 30th day of August, A. D. 1920.

[SEAL.] CHAS. F. JOY,
Recorder.

Q. Mr. Ringo, have you the permit issued to the Casting Company dated July the 6th, 1907, and numbered eighty thousand seven hundred and sixty-four?

A. Yes, sir. That is dated July 6th, 1907.

Mr. Taylor: What is that?
Mr. Walther: July 6th, 1907.

Q. And it is a permit to do what?
A. That is a twenty-four-inch pipe to replace that twelve-inch pipe.
49 Q. That is, they got a permit to put a twenty-four inch pipe in place of the twelve-inch pipe that they had before?
A. Yes, sir.
Q. Did you also inspect the laying of that?
A. No, sir.
Q. Does the permit show who the plumber or contractor was that laid the twenty-four-inch pipe?
A. Yes, sir; Mr. Henry Kastrup.
Q. Now, then, have you also a book, that is, the large plat book, showing these particular sewers?
A. Yes, sir.
Q. Well, will you produce that?
A. Yes, sir.
Q. Turn to page thirty-six; this plat book is one of the records of the sewer department?
A. Yes, sir.
Q. And you keep in the sewer department a record of the private sewers laid under permit?
A. Yes, sir.
Q. The plat shows the line of the sewer?
A. Yes, sir.
Q. And does this plat book show this twenty-four-inch private sewer from the property of the Malleable Casting Company to the Baden public sewer?
A. Yes, sir.
Q. And your plat book also shows, does it not, that this twenty-four-inch private sewer of the Casting Company is connected with the Baden public sewer?
A. Yes, sir.
Q. Now, the plat also shows, does it not, a 15-inch private sewer paralleling the 24-inch private sewer, running along the east part of the property of the H. W. Kuhs Realty Company?
A. Yes, sir.
Q. And that 15-inch pipe also connects with the Baden public sewer?
A. Yes, sir.
Q. The 15-inch pipe line begins at what point, approxi-
50 mately, south of the Baden sewer?
A. One hundred and sixty-nine feet, approximately; that is the length of the sewer.
Q. Only one hundred and sixty-nine feet? The length of the Kuhs 15-inch sewer, as you figured from this plat, is about 220 feet in length?
A. Yes, sir.
Q. The 24-inch pipe of the Casting Company, from the place

where it leaves the Casting Company's property to where it empties into the Baden public sewer, is approximately how long?
A. That right-of-way shows that 229 feet.

The Court:

Q. Was the 15-inch sewer a private sewer?
A. Yes, sir.

The Court:

Q. And how long was it, did you say?

Mr. Walther:

Q. It was considered longer than the Kuhs property 15-inch sewer?
A. Yes, sir.

The Court:

Q. In a general way, with reference to plaintiff's property, where does it begin?
A. It begins right at the north end of that property.

Mr. Walther:

Q. The northeast corner of the property?
A. Yes, sir.

The Court:

Q. Well, that is nearest to Broadway?
A. No, sir; that is nearest to the river.

Mr. Walther (resuming examination):

Q. Your plat book doesn't show the number of lines or the amount of pipe within the boundary to the private property?
A. No, sir.
Q. Mr. Ringo, does the plat which you have before you also show the district sewer number two?
A. Well, it shows a part of it.
Q. Does it show the part upon which the Kuhs property and the Malleable Casting Company property abuts?
A. Yes, sir.
Q. I will ask you whether a line or a section of that dis-
51 trict sewer doesn't run along the western seven and one-half feet of the Kuhs property from the north line of the prolongation of Glaze avenue to the south line of Christian avenue?
A. I couldn't tell you that.
Q. All right. Mr. Ringo, do you know when the connections with the Baden public sewer with these two private sewers, the Casting Company 24-inch line and the Kuhs 15-inch line, were made?
A. No, sir.

Q. Do your records show by what contractor the connections were made?

A. No, sir; it doesn't. Yes, sir; it does, too.

Q. This plat book doesn't indicate the time nor the name of the person who made the connection?

A. No, sir; no, I am mistaken about that—that is the district sewer.

Q. The two right-of-way deeds for the district sewer, one from Kuhs and the other from the Malleable Casting Company, are not in the custody of your department, are they?

A. No, sir.

Cross-examination.

By Mr. Taylor:

Q. As I understand, Mr. Ringo—now, you know nothing about sewering, the condition of the sewering of the Kuhs property in 1913, 1914 and 1915, do you?

A. No, sir; exept that part of the sewer—nothing except that private sewer.

Q. Except this private sewer?

A. That is all.

Q. You didn't know how many sewers and sewer connections they had with the Baden public sewer?

A. No, sir.

52 Redirect examination.

By Mr. Walther:

Q. Doesn't this plat book show all of the connections of private sewers with the Baden public sewer, from either the Kuhs property or the Malleable Casting Company property?

A. It shows those two sewers, yes.

Q. Well, aren't all connections which are made under permit of your department entered and shown on this plat?

A. Yes, sir; they are supposed to be.

Q. And the only two connecting lines on either of these properties that your plat book shows are the two that you have spoken of, the fifteen-inch pipe under permit to the Kuhs Company, and the twenty-four-inch pipe made by the Casting Company; is that not correct?

A. Yes, sir, that part; but there may be some somewhere else there.

Q. Well, I mean, this plat book shows the entire Kuhs property, doesn't it?

A. Yes, sir.

Q. And there are no other connections from the Kuhs property shown on that plat book except with this fifteen-inch pipe, are there?

A. No, sir; I don't think there is.

Recross-examination.

By Mr. Taylor:

Q. Do you say or contend that there are no other connections made? Is that your position?

A. No, sir; I don't say that; I say at that point through the Kuhs property.

Q. I see—I am speaking of the Kuhs property connection with the Baden public sewer; do you know how many connections
53 they had?

A. No, sir; I couldn't tell you except that private sewer.

The Court:

Q. You know nothing except what the plat shows?

A. That is all.

Redirect examination.

By Mr. Walther:

Q. So we will get the matter straight: The practice of your office, if I understand it, is to note or show on the plat of the sewer and property all connections made by authority of a permit from the City of St. Louis?

A. Yes, sir.

Q. If there is any other connection besides that one shown, those two shown there, that you have testified about, it has been without your knowledge and not under a permit from your office?

A. Yes, sir; unless it is shown there; I cannot remember that; unless it is shown there it has been laid without our authority.

Q. Unless it is shown on this plat?

A. Yes, sir.

Recross-examination.

By Mr. Taylor:

Q. A connection that existed with the public sewer, that is to say, that existed with the drain there, that is the old Gingrass Creek drain?

A. Yes, sir.

Q. Now, would a connection, when they converted that creek bed into the bed of the Baden public sewer, will a connection made then show on your book?

A. Well, it shows that they were connected to our sewer, that is, to the Baden sewer; but they would take a permit for it, though.

54 L. W. WEIR, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Walther:

Q. What is your name?
A. L. W. Weir.
Q. You are stenographer and assistant in the office of the secretary of the Board of Public Service in the City of St. Louis?
A. Yes, sir.
Q. How long have you been holding that position?
A. About seven years.
Q. And you held the same position with the old Board of Public Improvements under secretary of that?
A. Yes, sir; that is it.
Q. Have you brought with you the record book of the Board of Public Service, showing the official action of the board in November, 1914?
A. Yes, sir; I have.
Q. Will you turn to the record of November 17th, 1914? Was any action taken by the Board of Public Service with respect to the approval or recommendation of an ordinance establishing the taxing district for Baden District Number Two Sewer?
A. Yes, sir.
Q. Will you read what the record says with respect to that particular matter?
A. This is on page 126 of record No. 1, the president presented the following:

November 17, 1914.

Hon. Board of Public Service.

GENTLEMEN:

I have the honor to submit herewith plat in duplicate of proposed certain sewer district, against the property in which it is proposed to assess benefits for the payment, in whole or in part, of the
55 cost and expense of the construction of district sewers therein; also drafts of proposed ordinance to establish said sewer district, to wit:

An ordinance to establish a sewer district to be known as "Baden Sewer District Number Two."

I recommend the approval of said plat and ordinance, that said plat be filed and that the secretary be instructed to forward said ordinance to the Municipal Assembly with the recommendation that the same be passed.

Respectfully,

(Signed) E. R. KINSEY,
President Board of Public Service.

Recommendation of president approved, draft of ordinance approved and recommended to the Municipal Assembly for passage, and the secretary is directed to forward the same to the Assembly and to report to the Assembly the action of the Board thereon, by the following vote:

Ayes: Directors Talbert, Tolkacz; Swingley and President Kinsey.
Noes: 0.
Absent: Director Hooke (excused).

Q. Is there anything in the minutes of that meeting showing any discussion of this matter, or any report from the committee of the whole of the board?

A. I would have to refer to that committee record.

Q. I say, in the minutes of the board?

A. No, sir.

Q. What you have read there is all that appears in the minutes of this meeting on November 17th, 1914?

A. Yes, sir; that is the final action of the board on that.

Q. Mr. Weir, the practice in these matters was at that time,
56 and still is, is it not, to have the board first refer to the Sewer Commissioner a matter of the laying out of the proposed sewer district, then to have the board sitting as a committee of a whole receive his report and discuss the matter; and then when — board as a committee of a whole reaches a conclusion, have simply formal action then by the board sitting in its official capacity?

Mr. Taylor: I don't see the relevancy, materiality or the competency of that. This official body speaks by its records.

The Court: Objection sustained.

To which action of the Court plaintiff then and there excepted and still excepts.

Mr. Walther (resuming examination):

Q. Mr. Weir, did you, in your capacity as stenographer of the board, attend the meetings of the board sitting as a committee of the whole?

A. Yes, sir.

Q. And it was your duty to report whatever transpired at those meetings?

A. Yes, sir.

Q. Did you take the proceedings down in shorthand?

A. Yes, sir.

Q. And afterwards transcribe them on the typewriter?

A. Yes, sir.

Q. And those transcripts were filed away in the office of the secretary?

A. In the office of the president.

Q. The president of the board?

A. Yes, sir.

Q. And those records have been kept during the time that you have been at least making these records?

A. Yes, sir.
Q. And transcripts?
A. Yes, sir.
57 Q. Mr. Weir, did you report the proceedings of the board sitting as a committee of the whole which took place November 18th, 1913?
A. Yes, sir.
Q. Did you transcribe your shorthand notes of those proceedings?
A. Yes, sir.
Q. I show you a paper, a typewritten paper, which will be marked "Plaintiff's Exhibit B," and I will ask you whether that is a correct transcript of what transpired at the meeting of the Board of Public Improvements on November 18th, 1913?
A. Yes, sir.
Q. You have made this typewritten copy yourself?
A. Yes, sir.
Q. Did you also report the proceedings of the committee, the board sitting as a committee of the whole, meeting held February the 6th, 1914?
A. Yes, sir.
Q. And is the paper which I show you, and which will be marked "Plaintiff's Exhibit C," a correct transcript of the proceedings of that meeting?
A. Yes, sir.
Q. This was also made by you from your shorthand notes?
A. Yes, sir.
Q. I will ask you whether you also reported the proceedings of the committee, the board sitting as a committee of the whole, meeting held May the eighth, 1914?
A. Yes, sir.
Q. And is the paper, which the stenographer will mark "Plaintiff's Exhibit D," a correct transcript of the proceedings of that meeting?
A. Yes, sir.
Q. Likewise made by you?
A. Yes, sir.

Mr. Walther: I offer in evidence, it may be out of order at this time, though, the transcript of the proceedings before the Board of Public Improvements of the City of St. Louis, on November eighteenth, 1913, being the transcript marked "Plaintiff's Exhibit B."

58 PLAINTIFF'S EXHIBIT "B."

Memoranda Committee Meeting Nov. 18, 1913.

Baden Sewer Dist. #2.

All members present.
Mr. Hornsby: I represent the Calvary Cemetery Association and desire to present what might be called the ethical phase of the proposition. The Calvary Cemetery Association is an association, it is

not a stock company, it is not organized or run for profit, there are no shareholders or dividends and the revenue of the cemetery goes back into the maintenance, and under our charter if there is any surplus it goes to the Orphan Board for the support of the orphans of the Catholic Institutions.

The President of the Board is Archbishop Glennon and the sale of the lots is not restricted at all to the members of the Catholic Church. As a matter of fact, we are selling all the time lots to non-Catholics as well as to Catholics, for the reason probably that our prices are less than Bellefontaine Cemetery and people can't afford to buy in Bellefontaine and they buy in Calvary, irrespective of religion.

We consider that our cemetery, like Bellefontaine, is a quasi-public institution, it is not run for profit, the Board of Directors serve without compensation, we get no salary and while we
59 pay the men who work there, yet the officers and members of the Board of Directors serve gratuitously.

So far as the attitude of the Cemetery Association towards the city is concerned, when this Baden Public Sewer was built some two or three years ago, there was a serious question as to whether the city had the right to condemn a right-of-way through the Cemetery for the reason that the Cemetery is recognized in law as a public use and there was a question whether property could be condemned for public use as against an existing public use.

We recognized the absolute necessity of the Walnut Park people for a sewer, so we waived whatever question there was in that and we dedicated the right-of-way for this Baden Public Sewer thirty feet wide all the way through the Cemetery. I don't know what the distance is, but I judge three-fourths of a mile.

In addition to that, we entered into a contract with the city whereby we gave the city ten thousand dollars in addition to that right-of-way. When that public sewer was built there was a joint district sewer organized and sewers built west of the cemetery out in the Walnut Park District and the westernmost part of the cemetery was included of necessity in that joint sewer district by reason of the lay of the land, and there we paid twelve thousand dollars for that joint sewer district tax.

Bellefontaine Cemetery is organized under a special charter obtained from the Legislature back in the fifties the cemetery was created and under their charter they are exempt from general as well as special taxes.

60 We had an original charter from the Legislature, but ours was a joint stock charter. At that time we had certificates of stock, so in the sixties we surrendered that charter and took a charter under the general law, so we have not that exemption which the Bellefontaine cemetery has from special taxes.

The Constitution of the State of Missouri provides exemption for all cemeteries from general taxes, so we don't pay any general taxes the same as any other cemetery, but we recognize our liability for special taxes, and, as I said, we paid that sewer tax.

In addition to that, some time ago, when Mr. Travilla was in

office, he wanted to recommend the widening of Calvary avenue, which is a street running between Bellefontaine and Calvary Cemeteries, and we, the same as Bellefontaine, dedicated a strip ten feet wide. Bellefontaine gave ten feet and we gave ten feet without any question of condemnation. or anything else. That encroached on our property, but we figured the thing out and we were able to give that ten feet.

I mention those things to show you the attitude of the cemetery towards the city. We don't want to be understood as objecting to public improvements nor failing to contribute our share of such improvements. This sewer district which is now proposed to be built, Baden Sewer District #2, is built, as I understand, on petition of these people down here east of Broadway, and unquestionably any sewers will be a great advantage to them.

Broadway is our eastern boundary line. As Mr. Moreno has told you, twenty-three acres of our land slopes down towards
61 Broadway. This surface water will drain necessarily into this proposed sewer, and that, of course, is the only reason which I am satisfied would suggest to the board or the Sewer Commissioner the idea of including our land in this sewer district.

It seems to me, notwithstanding that fact, inasmuch as our property will never have any occasion to use the sewer for any purposes except the surface drainage, inasmuch as it is not held for profit, neither by an individual nor profit-owning corporation, but as I said, it is a quasi-public institution and recognized by the law, and recognized by the law as being a public use, and inasmuch as we have already done what I have just stated towards these improvements in the vicinity, it seems to me that as the law does not absolutely require that this property be taken in because the surface water runs into this sewer, that we were in a position where we could ask the board not to include this property in this sewer district.

Mr. Moreno tells me that approximately, figuring the cost of that sewer, it will mean an expense to us of about twelve thousand dollars. When we paid for those other improvements we had to go out and borrow the money, and we are still in debt for that joint sewer district twelve thousand dollars, and this will mean that much more debt for that joint sewer district on the cemetery, and while it is true that these sewers or a portion of them, such as will carry our surface water, will have to be built larger than would otherwise be the fact, yet this is a condition that must arise quite frequently that a district sewer is called on to carry off surface water originating outside of the district. Isn's that a fact?

62 Mr. Moreno: Very rarely. I don't know of any case since I have been in the Sewer Department where that has been done.

Mr. Hornsby: There is no law against it, at any rate.

Mr. Kinsey: A similar condition exists in the case of our general sewer district, where territory outside of the city is drained into the city sewer system and the city pays for the portion outside of the district.

Mr. Hornsby: In a joint sewer district there is an express provision

in the charter you have to include the entire drainage district in the joint sewer district.

Mr. Moreno: It is rather implied than specifically stated; provision is made that the city has to pay for all that portion outside of the city.

Mr. Hornsby: But the privision in the charter for a joint sewer requires all of the territory in the city that drains into that joint sewer to be included in the district; in other words, you have to take the entire watershed.

Mr. Moreno: It has been so interpreted and the Law Department has advised us to that effect, although it does not say it must be specifically.

Mr. Hornsby: That is not the law so far as the district sewer is concerned.

Mr. Kinsey: You spoke of the sewer district on the west side of the cemetery, which of necessity included part of the cemetery.

Mr. Hornsby: That was a joint sewer.

Mr. Moreno: That was a district sewer.

Mr. Kinsey: In what respect was that different from this?

Mr. Hornsby: If that was a district sewer it is not different
63 in any respect. I thought that was a joint sewer. If that was a district sewer it is not different in any respect. There was a certain area along the northwestern part of our property which drained into that sewer and that was included in that sewer district, and, as I say, we paid the tax on that, something over twelve thousand dollars.

Mr. Davis: Was that point considered at that time?

Mr. Hornsby: No, as a matter of fact, we didn't know that any of our property was to be included in that district until the tax bills were presented. We were unaware of the fact that the district included any of the cemetery property.

Mr. Moreno: I understand the attitude of Mr. Hornsby, and I think it is not unreasonable; at the same time, we have to consider this: If we cut out that twenty-two acres and assess the entire cost of those sewers against this district that is populated some of the property owners may contest the tax bills, as it is evident that the sewers do have to be made 20 per cent larger than they otherwise would have to be built to take care of that property outside of the district, and I am afraid we might not be able to get a contractor to bid on the work.

Mr. Hornsby: The increased cost falls on the city, not on the property owners.

Mr. Davis: Does that extra size arise on account of the storm water?

Mr. Hornsby: Yes. The increase of the sewers, I take it, would not be increasing all of the sewers?

Mr. Moreno: Not all of them, but, of course, it has to go through this one outlet.

Mr. Hornsby: It would probably take the most direct course from this property to the main sewer.

64 Mr. Moreno: Yes, it would come down this way.

Mr. Hornsby: So far as the use of the sewer is concerned,

of course, the territory east of Broadway would be very much more benefited; in fact, it would be of no benefit to us at all. They would have an additional use of the sewer, not only the surface water, but the foul water drainage which, so far as the individual is concerned, is the advantage of the sewer, if you put in a district sewer of exactly the same proportion that the others do, whereas they get that additional use which we never will have.

Of course, this property will be cemetery property forever; we expect after the cemetery is no longer used, after it is filled up with graves, to make some provision whereby there will be a perpetual maintenance of that property for a cemetery. The cemetery will never be allowed to fall into a bad condition.

Mr. Kinsey: The use of sewers for sanitary purposes does not increase the cost of the sewer. When the sewer is designed sufficiently large to take care of the storm water it does not have to be built any larger for the foul water drainage.

Mr. Hornsby: I understand that. The foul water is unquestionably the smaller proportion of the water that goes through the sewer, but the advantage to the property owners is in facility of draining his foul water and refuse. The storm water, so far as he is concerned, can be carried through the gutters. I mentioned this matter to Mr. Moreno the other day and he merely suggested that he would let me know when the board has its meeting to present the matter to you.

Mr. Davis: Has there ever been a case of exemption of that sort?

65 Mr. Moreno: I don't recall any since I have been here. We try to lay the districts out so they will be on a basis perfectly fair to all the property owners within the district, and for that reason we could not very well exclude territory of this kind.

I will say this for the Calvary Cemetery Association, their attitude has been distinctly friendly to the city and they were of great assistance to us in building that Baden public sewer, and if we can comply with their wishes we will be glad to do it; but, frankly, I don't see in this particular case how we can do it without getting into trouble with the property owners who would object if this property were excluded.

Mr. Kinsey: Suppose this happened, if it happened to be Bellefontaine Cemetery instead of Calvary, and Bellefontaine were excluded from the special taxes?

Mr. Moreno: The city would have to pay it.

Mr. Kinsey: In that case you would not undertake to lay out a district and put the increased burden on the property owners in the district?

Mr. Hornsby: So far as contesting the special tax-bills is concerned, I don't see when this board has acted and fixed the boundaries of the sewer district the property owners, any of them, will raise any question because it is a discretionary matter with the board, and after they have exercised its discretion the courts are not going to set it aside nor determine that the thing is not right.

I appreciate the opportunity anyhow of presenting the matter to you, and if the board thinks it can give us any relief at all it will certainly be appreciated, because, as I say, it will be quite a
66 hardship on us. It is immaterial to us whether the surface water goes through the sewer or along the surface.

Mr. Kinsey: The statement of the Sewer Commissioner, in case your cemetery was exempt, that is to say, in such an event, if the district was laid out as to exclude the cemetery, the city would have to pay the portion ordinarily assessed against the cemetery, and in that way, in imposing on the property owners in the district that additional burden it makes it difficult to exclude this cemetery in the present case.

Mr. Hornsby: That would be true if a portion of the Bellefontaine Cemetery were included in this district, the city would have to pay it.

Mr. Moreno: We have a case now where we laid out a sewer district on petition, that the people are anxious to have built, that contains as much of Bellefontaine as this district does of Calvary and we have had to hold it up in spite of the wishes of the people in the district because the city has no funds to pay its share of the cost.

The only thing I see we can do is to move the line over arbitrarily a portion of the distance, if the board thought that could be done. Still, that is establishing a precedent that might get us into trouble later.

Mr. Talbert: It seems to me you would have to follow the physical fact or lay yourself open to future trouble.

Mr. Davis: I suppose your theory is this: That every foot of ground must ultimately pay its proportion whether the owners pay it or in the case of the Bellefontaine Cemetery the city pays it.

Mr. Moreno: That is the theory in laying out districts in
67 unimproved territory. Here is an illustration of that here. A portion of this, you will notice that district runs around here and this portion is left out of the district for the reason this is already sewered and empties into the sewers here, private sewers, and when a new district is laid out this will be included in the new district and butt up against the district we are now establishing. That is the practice we are now following, everything that is out of one district is included in the next district when that is included.

Mr. Wall: You say this is already sewered, that block here?

Mr. Moreno: Yes; private sewers.

Mr. Wall: Why don't you leave that out?

Mr. Moreno: Because it does not drain into this. It is already emptying into the sewer down here.

Mr. Wall: They are private sewers. Is this property subdivided?

Mr. Moreno: No, it is not subdivided.

Mr. Wall: That railroad property never is subdivided and no sewers will ever be built there.

Mr. Moreno: No, except private sewers.

Mr. Wall: That doesn't seem right to me to cut that out.

Mr. Moreno: The drainage is all this way; it does not go in this direction at all. The natural drainage is all away from this.

Mr. Wall: Isn't it level?

Mr. Moreno: Fairly. None of the water ever gets into these sewers.

Mr. Wall: It looks to me like that property will escape taxation for a district.

Mr. Moreno: It is bound to if we build a joint district.

68 Mr. Wall: You are not building a joint district, that is a public sewer.

Mr. Moreno: I say if we should it would be included in the joint district.

Mr. Kinsey: None of the surface drainage in that area will reach the inlets in this sewer.

Mr. Moreno: That is the point exactly.

Mr. Hornsby: Well, I am much obliged to you, gentlemen, at any rate, and I wish you would see if you can't do something for us.

Mr. Taylor: I withdraw my objection to it.

Mr. Walther: I also offer in evidence the transcript of the proceedings of the meeting of February the 6th, 1914, Plaintiff's Exhibit "C".

PLAINTIFF'S EXHIBIT "C."

Memoranda Committee Meeting Feb. 6, 1914.

Baden Sewer District No. 2.

Mr. Moreno: I would like to have the careful attention of the board to this Baden S. D. #2, which was discussed before the board some time ago. This is the case where we take some twenty-three acres of Calvary Cemetery, and Mr. Hornsby appeared before the board to protest, but you will notice from this plat that there is a large amount of property which is within this district, and the people who own the property have been coming down regularly for the last two months asking us to hurry the work of constructing the sewers. Regardless of Mr. Hornsby's contention, there was another matter that came up.

69 This Kuhs property on our plans we left out of the district and I want to explain the reason why that was left out and see if we should approve the plan on which it is left out or revise the plan and take it in. This property is not subdivided and Mr. Kuhs has laid these two private sewers which drain his property into the public sewer, so that none of the drainage from this property would pass off from the sewers in the district that we propose to lay out.

Another thing, in order to properly drain the district, we are compelled to have a right-of-way from Kuhs' property in which to lay one of our sewers. He gave that right-of-way with the understanding that if we accepted it and laid out the district that his property would be left out on the ground he had started it and it did not drain through any of the district sewers.

If we decide to put his property in the district we will have to give him back this right-of-way and enter condemnation proceedings to acquire it. In order that these people may have relief we have to go ahead with the district and include this property in Calvary

Cemetery regardless of their protests, and it is an open question as to whether or not we should leave this other out or put it in.

The controlling consideration is time. One property owner was in the office yesterday who owns three lots up there and he said he had just paid thirty-seven dollars on an order from the Health Department to have his vaults cleaned, and leaving this property out would make a difference in his tax bills of six dollars. It occurs to me if we do leave this property out some of these other gentlemen who own vacant property might contest the tax bills.

70 Mr. Wall: In talking of that before, you were going to see if there was not another way to get your sewers there.

Mr. Moreno: There is not.

Mr. Wall: Does Kuhs own this property clear up to Broadway?

Mr. Moreno: No, sir.

Mr. Wall: Who owns that?

Mr. Moreno: Mr. Schnell and Querle.

Mr. Wall: You might get a right-of-way through there; go in next to Broadway. Would it be possible to go along Broadway down that way?

Mr. Moreno: This map does not show the sewers in there and I guess I had probably better have the sewers put on there. I will bring that in at the next meeting of the board.

Mr. Taylor: That may be considered in evidence.

Mr. Walther: And likewise the transcript of the meeting of May the 8th, 1914, Plaintiff's Exhibit "D".

PLAINTIFF'S EXHIBIT "D."

Memoranda Committee Meeting May 8, 1914.

Baden Sewer District No. 2.

All members present.

Mr. Hooke: Some time ago you remember you had Mr. Hornsby before you about Baden No. 2. I thought I had a key map of the whole territory. It takes all of the territory east of Broadway to the water works conduit and about two blocks south from, I think, Thatcher avenue, and northwardly practically to the

71 Baden Sewer right-of-way, which is the old Baden or Gin Grass Creek, and in that territory there is something like twenty-three acres in Calvary Cemetery that drains through this territory, and at the estimate we made Calvary Cemetery would pay something like twelve thousand dollars as their proportion, twelve thousand four hundred dollars.

It is natural that Calvary Cemetery wants to escape that, and I don't think myself it is fair you should tax that at the same rate. therefore, if they could take care of their own drainage it would be perfectly fair as well as legal to leave them out of the district, so I prepared a plan showing if they would follow it they could eliminate that twenty-three acres and make a district of their own and then we would cut the size of this sewer.

Mr. Kinsey: The proposition would be to construct a sewer along Broadway which would intercept all of this drainage from the cemetery and carry it through to the public sewer.

Mr. Wall: It would be a private sewer.

Mr. Hooke: Yes, to take care of their own drainage.

Mr. Kinsey: To intercept and keep all of that drainage out of the district.

Mr. Talbert: What would it cost them?

Mr. Hooke: About forty-five hundred dollars; it will probably cost more than that when they get through with it.

Mr. Wall: They have to have sewers with inlets so as to catch the water.

Mr. Hooke: They have it complete to take the drainage. I think it is absolutely correct and legitimate for them to do that.

72 Mr. Wall: What have you done about the Kuhs property?

Mr. Hooke: Nothing, for two reasons; the first is, he gave us all of those rights-of-way. I was sitting in there with the Sewer Commissioner myself, on condition that his sewers that were in there would be accepted, and if his sewers are accepted there is no reason why we should put him in the district.

Mr. Kinsey: Has he anything to amount to anything?

Mr. Hooke: He has three lines.

Mr. Kinsey: Would they be willing to accept that as a district?

Mr. Hooke: Yes.

Mr. Kinsey: As part of the permanent sewer system?

Mr. Hooke: Yes. It has never been put on record, but I can make him put it on record in case it goes through this way, and if any inlets are required other than what are there he would have to put them in. If his land was on the high site you could not do it, but being on the low site I don't see anything wrong with it, especially in view of the fact if we don't do that we must pass an ordinance and give him back those rights-of-way which were obtained under a misrepresentation.

Mr. Kinsey: I think if the sewers in there are complete and adequate and are constructed you can accept them as part of the sewer system and it will be proper to establish that as a separate district and then it will be proper to cut them out of District No. 2.

Mr. Hooke: That was my idea exactly. So if this is 73 satisfactory I will write to Mr. Hornsby this afternoon and tell him if these people will do this——

Mr. Kinsey: In other words, they are to provide a sewer with the necessary inlets so as to intercept all of the water from their premises and carry it to a public sewer so no drainage from the cemetery will reach the sewers in the proposed sewer east of Broadway, and if they do that, then the territory in the cemetery will be excluded from the sewer district.

Mr. Hooke: It is just like making two sewer districts.

The members unanimously agreed to this solution.

Mr. Taylor: I am willing to have that go in without objection.

Q. Mr. Weir, have you gone through the proceedings before the committee of the Board of Public Improvements, or the board sitting as a committee of the whole, between the first date there in 1913 and November 17th, 1914, when the ordinance was reported?

A. Yes, sir.

Q. Have you been able to find that the matter of the Baden District Sewer Number Two, the laying out of the district, was up before the board for discussion at any other meetings than those of which you have furnished the transcripts?

A. No, sir; only those three meetings.

Q. And then the final action as shown by the secretary's record, which you have read?

A. Yes, sir.

Cross-examination.

By Mr. Taylor:

Q. According to your memorandum, this question of laying out this district, and the question of including in the district the
74 property of Kuhs and of the Calvary Cemetery was discussed, as you have described here in this report from the eighteenth of November—I mean, from time to time from the eighteenth day of November, 1913, until the eighth day of May, 1914?

A. That is true; yes, sir.

Q. It came up at those several times for discussion?

A. Yes, sir.

Q. And on the eighth day of May, the proposition was agreed to?

A. Yes, but I will have to read that again. That is true; yes, sir.

Q. That was the final action on the question of laying out the district?

A. Well, as far as my records show of the committee meetings.

August F. Meckfessel, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Walther:

Q. What is your name?

A. August F. Meckfessel.

Q. You are a plumber?

A. No, sir; I am not.

Q. What are you?

A. I do general jobbing; I am a contractor.

Q. Were you ever in the employ of Mr. H. Kastrup?

A. Well, I have been a partner with him.

Q. Well, he was engaged, and still is, in the business of granitoid and cement work?

A. Yes, sir.

Q. Construction work?

A. Yes, sir.

Q. Did you, either on your own account or in connection with Mr. Kastrup, construct any sewers in the property of the Malleable Casting Company?

A. Yes, sir.

75 Q. Did you lay the line of pipe in 1907, when the twenty-four-inch pipe was laid?

A. Yes, sir.

Q. The twenty-four-inch pipe extends, does it not, from the north boundary line of the Casting Company's property to the Baden public sewer?

A. Yes, sir.

Q. At the time you made it, the Baden public sewer had not been built?

A. No, sir.

Mr. Taylor: You mean district number two?

Mr. Walther (resuming examination):

Q. The public sewer was built some time before the district sewer was built?

A. Yes, sir.

Q. But at the time that you built the private line of the Casting Company, the public sewer had not yet been built, had it?

A. No, sir.

Q. And the twenty-four-inch pipe had been laid into the old Gingrass Creek?

A. Yes, sir.

Q. When they built the Baden public sewer they used the bed of the old Gingrass Creek for the greater part, as the excavation bed for that sewer, didn't they?

A. I suppose that they did.

Q. This twenty-four-inch pipe was made in the fall of 1907, wasn't it?

A. Yes, sir.

Q. And you also made the twelve-inch pipe?

A. Yes, sir.

The Court: Wasn't that fifteen?

Mr. Walther: No, sir; the fifteen-inch pipe was the Kuhs pipe, and the twelve-inch pipe is the original pipe of the Casting Company, which was replaced by the twenty-four-inch pipe?

A. No, sir; I didn't lay the twelve-inch pipe.

Q. But you do know that there was a twelve-inch pipe that 76 you took out and replaced with a twenty-four-inch pipe?

A. Yes, sir; in the very same branch; yes, sir.

Q. Now, as to the sewers within the property lines of the Casting Company, what size pipes was there in the Casting Company's property prior to the time that this district sewer was built?

A. What size pipe?

Q. Yes, sir.

A. Well, I laid a twenty-four-inch pipe within twenty-five feet alongside of the building line, and from that I run an eighteen-inch pipe to the center of the plant to catch all surface drains and downspouts and so forth; and I ran in another lead from the manhole up to the office to drain the toilet and such as that at the office and throughout the plant, you know; I laid out branches from twelve and eight and ten, and always smaller, you know.

Q. Was the entire property of the Casting Company's sewage in such a way as to take care of all of the surface water and the foul water, before this district sewer was built?

A. Yes, sir.

Q. How is the property of the Casting Company improved?

A. How it is improved?

Q. What buildings are there?

A. Well, there are quite a number of buildings; mostly the entire block is all buildings.

Q. Of the Casting Company's property?

A. Yes, sir.

Q. And is there foundry buildings and office buildings?

A. Yes, sir; and engine rooms and buildings, rooms, and so forth.

Q. There are no dwelling buildings on the Casting Company's property, are there?

A. No, sir.

Q. Are you familiar with the Kuhs property, right across
77 the way from the Casting Company's property?

A. Yes, sir; just by working there.

Q. And how is that improved in a general way? What kind of buildings are on that?

A. Well, they have a whole row of flats there on the west side of the conduit—two rows.

Q. Well, it is improved with flats and dwelling houses and cottages?

A. Yes, sir.

Q. Have you within the last year or since the district sewer was built been at the Casting Company's plant?

A. Have I been there?

Q. Yes, sir.

A. Yes, sir.

Q. Did all these sewer pipes, which you have told us about, drain into the twenty-four-inch private pipe? Do they still drain into that twenty-four-inch pipe?

A. Yes, sir.

Q. So that this private twenty-four-inch pipe, which had served the Casting Company plant before the district sewer was built, is still taking care of all of the lines that you ran into it?

A. Yes, sir.

Q. You have told us of the various inlets for taking care of the surface water in the company's property?

A. Yes, sir.

Q. By the way, there are no streets or alleys running through the Casting Company's property, are there?
A. No, sir; no public streets or alleys.
Q. Did you attend to the making of the connection with the twenty-four-inch pipe and the Baden public sewer?
A. No, sir.
Q. I will ask you whether, based upon your experience in this building of sewers and work of that kind, whether the twenty-four-inch pipe and the sewers which they had in the Casting
78 Company's plant before this district sewer was built, were adequate?

The Court: He has already answered that.
Mr. Walther: Then I will withdraw that question.

Cross-examination.

By Mr. Taylor:

Q. As a matter of fact, Mr. Meckfessel, the St. Louis Casting Company is connected with the Baden sewer number two now and did make the connection at the completion of the sewer, did they not?
A. I don't understand the question.
Q. The St. Louis Malleable Casting Company has a connection now, has now connections with the Baden District Sewer Number Two, hasn't it?
A. What sewer is that district number two?
Q. This new sewer that was built there? Don't you know what that is?

Mr. Walther: That is the city sewer.
The Witness: They have a connection with that.

Mr. Taylor:

Q. Have they?

The Court:

Q. Since you built the private sewers, they have connected them with the public sewer?
A. Yes, sir; they have one connection with that sewer.
Q. That is one connection with the district sewer?
A. Yes, sir.

The Court:

Q. Well, they are all connected?
A. No, sir; just one connected.

Mr. Taylor (resuming examination):

Q. With the city sewer—I am not talking about the Baden Public Sewer—you know the difference, don't you?

A. Yes, sir.
Q. The Baden Public Sewer is the sewer in which Baden District Number Two discharges itself?
A. Yes, sir.
79 Q. It is the sewer into which to discharge the contents of sewer pipe twenty-four inches that you have been talking about—you know that, don't you?
A. Yes, sir.
Q. Now, the St. Louis Malleable Casting Company made connection, or do you know when they made connection with this city sewer?
A. No, sir; I do not.
Q. But you do know that they have a connection?
A. They have one connection; yes, sir.
Q. You say that the existing sewerage, before the city sewer, the Baden District Number Two, was adequate, did you?
A. Yes, sir.
Q. What experience have you had as a sewer man?
A. Well, I have had twenty-five years of experience.
Q. What kind of sewering do you do?
A. Just jobbing of all kinds.
Q. Who are you working for?
A. Myself at the present time.
Q. How long have you been working on your own account?
A. For myself?
Q. Yes, sir.
A. About four years, and I was with Kastrup for fifteen years, H. Kastrup & Co.
Q. Now, do you know that the St. Louis Malleable Casting Company obtained a permit pending the building of this sewer?
A. No, sir.
Q. You don't know that?
A. No, sir.

Redirect examination.

By Mr. Walther:

Q. You do know that one connection was made with the district sewer and a new pipe that was laid in the Malleable Casting Company's plant?
A. Yes, sir.
Q. But all of the pipes which had formerly drained into the Baden Public Sewer were through the twenty-four inch pipe
80 and were left just as they were before, weren't they?
A. Yes, sir.
Q. So that nothing drains into the district sewer from the company's plant, except this one line?
A. Just that one line.
Q. Where is that from and at what end of the property?
A. It is away at the west end of the property, and it runs from the coreroom to drain a pit from the coreroom.

Mr. Taylor:

Q. That is a part of the factory?
A. Yes, sir.

Mr. Walther:

Q. That is the only connection that has been made with the district sewer?
A. Yes, sir.

WALTER C. RAITHEL, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Walther:

Q. What is your name?
A. Walter C. Raithel.
Q. What office do you hold with the plaintiff company?
A. Assistant secretary of the St. Louis Malleable Casting Company.
Q. Mr. Raithel, how is the property of the Casting Company improved with respect to buildings?
A. Since when?
Q. I mean, how was it improved at the time this district sewer was constructed, when they began constructing it?
A. There hasn't been any changes in the plant since 1907, and our roofs cover about ninety thousand square feet; and there wasn't any improvements made, except some small sheds put up around various parts of the plant where there was no drainage; it
81 simply acts as shelters for raw material laying in the yard.
Q. The downspouts from this refuge you have just mentioned, drain into what?
A. Originally into this twelve-inch sewer, the connections throughout the plant connecting with that twelve-inch sewer that they put in originally.
Q. And now?
A. Now they drain into this twenty-four-inch drain, from the improved connections which were put in after 1907.
Q. That has been so since 1907 and is still so?
A. Yes, sir.
Q. Does any of that surface water or the water that comes from the roofs of your buildings find its way into this district sewer?
A. Yes, sir; in one instance at the south side of the plant which connects it, the end of the core room, where this connection is made into the district sewer, the one Mr. Meckfessel spoke about.
Q. That is a new line put in after the district sewer was built?
A. Yes, sir.
Q. Mr. Raithel, have you figured up the cost to your company of

the construction of the private sewer which it had in its property and connecting with the Baden public sewer to the construction of the district sewer?

A. Yes, sir.

Q. And what is the total?

A. From the origination of the plant between the twelve-inch and the twenty-four inch it amounts to about forty-five hundred dollars; and then afterwards there are some few invoices that we found there of other improvements that we have made in the sewer system, that we were compelled to make, which would probably run another thousand dollars.

82

Q. They are all in connection with this private sewer before the district sewer was built?

A. Yes, sir.

Q. Did you have any trouble or difficulty in draining your property into your private system before this district sewer was built?

A. No, sir.

Q. You never had any overflows after the twenty-four inch pipe was put in?

A. No, sir.

Cross-examination.

By Mr. Taylor:

Q. Were you familiar with the acts of your company with reference to the construction of this sewer?

A. Surely.

Q. Your company was one of the petitioners, was it not?

A. Yes, sir.

Q. For the sewer?

A. Yes, sir, we were.

Q. And your company made application pending the construction of the sewer for a license to connect?

A. Yes, sir.

Q. And subsequently you did connect?

A. In this one instance, as stated.

Q. I say, you made a connection?

A. Yes, sir.

Q. And have maintained that connection ever since?

A. Yes, sir; we agreed to the permit for the benefit of the community; not for any benefit of ours exactly.

Q. But you petitioned for it.

Mr. Walther:

Q. Do you mean that you signed a petition?

A. No, sir; it was agreed.

Mr. Taylor (resuming examination):

Q. Well, tell us what you did do?

A. I don't know whether a petition was signed or not.

Q. Well, you knew the sewer was going to be constructed,
83 and you were willing to have it constructed, weren't you?
A. I cannot answer for the entire officers of the plant.
Q. Can't you speak for the company?
A. No, sir. I won't answer that, because there are a good many officers in this company, and one may say something while another one don't know anything about it.
Q. Well, your company made the application for the permit?
A. I can't answer that question.
Q. Did you apply for the permit?
A. I can't answer that question.

Mr. Walther: He said they connected——
The Witness (interrupting): Well, I did answer that question and I answered it wrong—that is sufficient.

Mr. Taylor (resuming examination):

Q. Well, as a matter of fact, you have made the connection?
A. Yes, sir.
Q. And you made that connection upon the completion of the sewer? You do know that?
A. Yes, sir; we did.

Redirect examination.

By Mr. Walther:

Q. Your company would have had no objection to paying its proportionate part of the cost of a sewer, if all of the other property situated like yours and receiving the same amount of the benefit had been included in the taxing district?
A. No, sir.

The Court:

Q. In other words, the Kuhs property and the cemetery property, you mean?
A. Yes, sir; no, we didn't enter any objection to that, and I think that the president of the company had it up at the time that the permit was asked for.

84 Mr. Walther (resuming examination):

Q. I forgot to ask you whether your company didn't give to the city, without any compensation, a right-of-way ten feet in width off the west line of your property its entire length from north to south?
A. Yes, sir.
Q. And you got no consideration for that?
A. No, sir.
Q. And the district sewer, part of it, is laid in that right-of-way?
A. Yes, sir.

J. T. DODDS, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Walther:

Q. What is your name?
A. J. T. Dodds.
Q. You are a civil engineer and surveyor?
A. Yes, sir; City Surveyor and civil engineer.
Q. You are a graduate of what school?
A. I am not a graduate; it is the school of experience.
Q. How long have you been practicing?
A. Thirty years.
Q. Mr. Dodds, have you examined the property in this Baden district, Sewer District No. 2?
A. Yes, sir.
Q. The Calvary Cemetery along Broadway, Mr. Dodds, is how situated with respect to Broadway, as to elevation?
A. Why, the ground in Calvary Cemetery starts at about the level of Broadway along the west line of Broadway, and gradually rises somewhat to quite an elevation; I did notice, back, say, from five hundred feet to one thousand feet back.
Q. This is quite a steep hill there, is it not?
A. Yes, sir; it is quite an abrupt place, you might call it.

Mr. Taylor:

Q. Upgrade?
A. Yes, sir.

85 Mr. Walther (resuming examination):

Q. And have you, Mr. Dodds, a topographical map—figure out the number of acres of Calvary Cemetery; that is, in the natural water-shed of this sewer?
A. Yes, sir; according to the topographic map published by the City of St. Louis, there is twenty-three and forty-five hundredths acres of Calvary Cemetery which drains toward Broadway and into this District No. 2.

Mr. Taylor:

Q. Do you mean drains into that sewer?
A. No, sir; I said toward Broadway.

Mr. Walther:

Q. The natural drainage?
A. Yes, sir.

The Court:

Q. It would go to the sewer, if it wasn't for the ditch?
A. Yes, sir.

Mr. Walther (resuming examination):

Q. Mr. Dodds, there was originally, was there not, a small sewer along the west line of Broadway for a part of Calvary Cemetery and extending to the north?

A. I don't think there was any sewer along Broadway in front of the cemetery; but at the northeast corner, I guess you might call it, that is at the intersection of Broadway and the Wabash Railroad, the water naturally drained to that point from those twenty-three acres of the cemetery; and at that point the city had constructed two or three inlets, and the sewer from there led northward along the west side of Broadway into Gingrass Creek.

Q. You are familiar with the Kuhs property right opposite that of the Casting Company's property?

A. Yes, sir.

Q. That property is improved and was at the time of the proposed construction of the district sewer with a number of two-story brick flat buildings, was it not?

A. Yes, sir.

86 Q. Do you know approximately how many families live in the Kuhs property?

A. There is in the neighborhood of one hundred.

Q. There is in the neighborhood of one hundred?

A. Yes, sir.

Q. And have you recently been over the Kuhs property with a view to ascertain whether there are any inlets into any sewer to take the surface water, that is, into any private sewer in the Kuhs property?

A. Well, I walked over it and didn't see any, but I won't say I made a minute examination; there may be one or two, but there are none that are visible in an ordinary examination.

Q. Now, there are streets and alleys through the Kuhs property, which are prolongations of public streets and alleys to the west, are there not?

A. Yes, sir; there are private places used as streets and alleys.

Q. And which are prolongations—for an illustration, Blase avenue on the west?

A. Yes, sir.

Q. Mr. Dodds, how many square feet are there in the Kuhs tract, which was not included in the taxing district?

A. That is, west of the conduit?

Q. All that fifty-foot strip?

A. And not included in the district; there are three hundred and seventeen thousand three hundred and ninety-eight square feet, which is equivalent to seven and two hundred and eighty-six thousandths acres.

Q. Have you made any calculations as to comparison of the total area of the district as laid out by the Board of Public Service and the district including the Kuhs property and the twenty-three acres of Calvary Cemetery?

A. Yes, sir; if you were to include the twenty-three and a
87 fraction acres in Calvary Cemetery and the Kuhs property, together with the property that is already in the district, the property that is in the district that has been assessed in the district would be sixty-three and seventeen hundredths per cent of the total area. In other words, sixty-three and seventeen hundredths per cent of the drainage area has been included in the assessment district.

Q. This sixty-three and seventeen hundredths has been taxed with the whole cost of this improvement of a net drainage area of one hundred per cent?

A. Yes, sir; that is right.

Q. How does the area of the Kuhs property, which was left out of the taxing district, compare with the area of the Casting Company's property?

The Court: In what way do you mean?

Mr. Walther:

Q. What is the area of the Casting Company's property?

A. I haven't got that. I think the Kuhs area is slightly larger than the Casting Company's.

Mr. Taylor:

Q. They are pretty nearly the same?

A. They look to be about the same to look at the map.

Mr. Walther (resuming examination):

Q. You gave us the area of the Kuhs property?

A. Yes, sir. That is, I gave you the area of the Kuhs property outside of the district, but they have some that is in the district.

Q. Now, can you tell from your plat where the line of the district sewer has been laid with respect to the Kuhs property?

The Court: That shows on the map, Mr. Walther.

Mr. Walther (resuming examination):

88 Q. It is shown, if it is understood that the Kuhs property includes this (indicating) tract in forty-two thirty and forty-two hundred and thirty-one-E?

A. Yes, sir. Covered by the manufacturers' subdivision on this plat.

Q. Mr. Dodds, will you tell us what the size of this district sewer is, beginning at the southwest part of it? The size of the district sewer?

A. Starting in the alley one hundred and twenty feet east of Broadway and north of Calvary avenue, they have a twelve-inch sewer in that alley; and then running eastward on Calvary avenue

there is a fifteen-inch sewer to the first manhole, which is a few feet east of a thirty-foot wide private street about the center of city block forty-two hundred and twenty; from the last-mentioned manhole eastward to West Railroad avenue there is a twenty-four-inch sewer, and then running northward along West Railroad avenue to the first manhole there is a thirty-inch sewer; from the last manhole to the next manhole, which is about two-thirds of the way across the block, there is a thirty-three-inch sewer; from the last manhole to Thatcher avenue there is a thirty-nine-inch square brick sewer; and thence going eastward on Thatcher avenue, crossing the Wabash right-of-way, there is a forty-five-inch square brick sewer down to Fortieth street; and then from Fortieth street to about the west line of what was formerly the Malleable Casting Company's property; I believe that they now own up to Fortieth street, but to the portion which is shown on the plat it is a forty-eight-inch sewer; and then from the west line of the Malleable Casting Company down to the conduit there is a fifty-four-inch sewer; and running north-
89 wardly along the conduit to the line of the Terminal Railway Company, or to the north line of the Malleable Casting Company, there is a fifty-four-inch sewer; and then from that point to the public sewer there is a fifty-seven-inch sewer.

Q. That is, the fifty-seven-inch sewer is in front of the Kuhs property?

A. Yes, sir.

Q. I call your attention to little oblique lines on the district sewer in front of the Kuhs property on its east line right in front of the fifty-foot in width strip, included in the taxing district, and ask you what those lines are and what they indicate?

A. They indicate a sewer connection.

Q. Those slants indicate that a connection can be made with this district sewer from the property adjoining it?

A. Yes, sir.

Q. So that the property belonging to the Kuhses, which adjoins that part of the sewer, can be connected with it?

A. Yes, sir.

Q. But the property has been assessed only a depth of fifty feet, is that right, from east to west?

A. Yes, sir, according to this plat.

Q. The full length of the property, but the eastern depth is only fifty feet?

A. Yes, sir.

Q. And the convenience or place for connecting the Kuhs property with this district sewer, according to this official plat, had been left in the construction of the sewer?

A. Yes, sir.

Q. Mr. Dodds, isn't a sewer which reaches the size of fifty-seven inches of unusual large dimensions for the draining of a district of a total area of two million, two hundred and ninety-six thousand and thirty-nine square feet?

90 A. Yes, sir; it ould be unusually large for that district, but this sewer doesn't drain all of that district; this is only the southern part of it.

Q. That is, this fifty-seven-inch sewer, which you say would be unusual if it drained the entire district, doesn't drain but the southern part of it?

A. Yes, sir.

Q. And it is the southern part that would get, would it not, the flow or the drainage from the Calvary Cemetery?

A. Yes, sir.

Q. Do you know, Mr. Dodds, when they opened a ditch along the west side of Broadway in front of the Calvary Cemetery, was constructed with respect to the time of the construction of the district sewer?

A. Except in a general way.

Q. Well, was it before or after?

A. It was after.

Q. You don't recall how long afterwards?

A. I don't know just when this district sewer was built of my own knowledge.

Mr. Taylor:

Q. You say the Calvary sewer was built after or before?

A. After.

Mr. Walther (resuming examination):

Q. Do you know how long it has been since this Calvary ditch was completed,

A. It was less than a year ago.

Q. Is this Kuhs tract in the same natural drainage basin as the Malleable Casting Company property?

A. Yes, sir; it is a piece of bottom land; there is no distinction between them at all.

Cross-examination.

By Mr. Taylor:

Q. Mr. Dodds, with reference to the topography of Calvary Cemetery, the natural flow of surface water is eastward and northeastward; that is to say, the surface of Calvary Cemetery in disposing of its natural flow of water, it runs east and northeast; that is
91 true, isn't it?

A. Yes, sir; that is, of this particular twenty-three acres we have been talking about.

Q. On this particular ground?

A. Yes, sir.

Q. That surface water, that flows naturally in that direction?

A. Yes, sir.

Q. And always did as far as your account of history is concerned?

A. Yes, sir.

Q. Now, you know nothing about the condition of sewerage of the Kuhs property, do you, prior to the construction of Baden District Sewer Number Two?

A. I don't know anything about it, except what I find on the records.

Q. You don't know anything about it, except what you find on the records?

A. Yes, sir; that is right.

Q. Nothing by investigation—that is to say, by personal observation?

A. I have nothing to do with the construction of any of them.

Thereupon court was adjourned to reconvene again at ten o'clock a. m. the following day; at which time the following proceedings were had, to wit:

Mr. Walther: I will next offer in evidence special tax bill numbered twenty-seven thousand seven hundred and one, dated December twenty-second, 1916, against the St. Louis Malleable Casting Company, and describing the property described in the petition, the amount of the tax bill being nine thousand one hundred and sixty-eight dollars and eighty-six cents.

Special tax bill No. 27701 was then offered in evidence, as follows:

92 *Special Tax Bill.*

No. 27701. St. Louis, Dec. 22nd, 1916.

Office of Board of Public Service.

St. Louis Malleable Casting Co., Owner, to The George G. Prendergast Construction Company, Contractor, Dr.

For constructing Sewers in Baden Sewer District No. 2 Under authority of the Charter and Ordinances Nos. 27890 & 28167, and under Contract No. 10864.

Chargeable against lot No. 1 and Pt. 9, in City Blocks Nos. 4230 594 00
and 4231-E, having an aggregate front of 396 99 & 200.42 feet, by a 495 00
depth of 558 85 feet, bounded north by St. L. T. Rywy. Co. et al., east by City of St. Louis, south by Thatcher Ave., west by East Line C. B. 4231*w* et al.

Area in district, sq. ft.	Total cost of sewer, dolls., cts.	Rate per 100 sq. ft., dolls., cts.	Area in lot, sq. ft.	Amount, dolls., cts.
2,296,039	65,744.67	2.86339	320,210	9,168.86

I hereby certify that the above mentioned work was done by the above mentioned contractor according to contract prices, and that upon the completion thereof, the Board of Public Service has caused the entire cost and expense of the aforementioned work to be com-

puted, and has levied and assessed against the above mentioned lot its proportion of said cost and expense, and that the amount
93 thereof is nine thousand one hundred sixty-eight and 86/100 dollars, and that this bill is duly registered in the office of said board.

By order of the Board of Public Service.

LEO OSTHAUS,
Assessor of Special Taxes.

Registered and certified:

G. L. EHRLICH.

By order of the Comptroller.

Mr. Taylor: I understand that these transcripts of proceedings before the board referring to the subject matter of the Kuhs property and to the Cemetery Association, that that is in evidence?

The Court: Yes, they are in evidence.

Mr. Walther: You waived any objection to them.

Mr. Taylor: That is right.

JOSEPH MCMAHON, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Walther:

Q. What is your name?
A. Joseph McMahon.
Q. What is your business?
A. Contractor.
Q. What is the name of your company?
A. John F. McMahon Construction Company.
Q. Did your company build for the Calvary Cemetery Association an open sewer or ditch along the Broadway part of the cemetery?
A. The construction company didn't, because they weren't in existence, but my father did.
94 Q. And the construction company succeeded him since?
A. Yes, sir; since his death.
Q. When was that work completed?
A. March, 1917.
Q. March, 1917?
A. Yes, sir.
Q. That included the building of the underground sewer connecting with the main public sewer, did it?
A. Yes, sir.
Q. When was the work of building that open drainage started?
A. October, 1916.

The Court:

Q. That is the ditch on the east side of the cemetery?
A. Yes, sir.

Mr. Walther (resuming examination):

Q. That sewer along the Broadway front, from the middle gate on Broadway up to or almost up to the place where the Wabash Bridge crosses Broadway, is just an open drainage, is it not?
A. No, sir; it is a twenty-seven-inch-pipe sewer there.
Q. At the bridge, yes—but up to that point?
A. It is a twenty-seven-inch-pipe sewer from the center entrance to Calvary Cemetery at Broadway, running north to the Wabash right-of-way, that is, a twenty-seven-inch-pipe sewer under ground.
Q. Well, there is—where does the open drainage start?
A. It starts at Calvary avenue and runs to the center gate of Broadway.

The Court:

Q. Calvary avenue is the south side of the cemetery?
A. Yes, sir.

Mr. Walther:

Q. That open drainage runs to the center gate and thence north there is an underground pipe?
A. Yes, sir.

95 Cross-examination.

By Mr. Taylor:

Q. This sewer that your predecessor put in intercepts and carries off all the surface water drainage of the eastern part of Calvary Cemetery?

Mr. Walther: I object to that as it isn't shown that this witness is qualified to base an opinion on that whether it carries off all the surface water.

The Court: Objection sustained. You may ask him what he knows about the surface water.

Mr. Taylor (resuming examination):

Q. What have you observed about it, if anything, the sufficiency of the sewer, this sewer put in by your predecessor, in carrying off the surface water?

A. The intention of the sewer is to carry off the surface water from the eastern slope of the cemetery.

Mr. Walther: I move that that answer be stricken out as not being responsive to the question.

The Court: Motion sustained.
Mr. Taylor: There is no proof that there is any other condition.
The Court: But you asked him what he saw, and he answers that it was the intention to do something.

Mr. Taylor (resuming examination):

Q. You have had experience in sewer making?
A. Yes, sir.
Q. And of the size, the necessary size, of a sewer to carry off such an amount of drainage?
A. Yes, sir.
Q. In your opinion, would that sewer as you found it constructed, be sufficient to carry off the drainage of the eastern, the surface drainage of the eastern portion of the Calvary Cemetery?
A. Yes, sir.

Mr. Walther: I object as it is not shown that the witness is qualified to pass upon that.

The Court:

Q. How much surface is there on Calvary which drains
96 that way, towards the east, towards Broadway?
A. Why, about one thousand feet long and seven hundred feet back.

Mr. Taylor (resuming examination):

Q. What experience have you had that would enable you to determine what sort of a ditch or what sewer would carry off any amount of surface water?
A. Just by observation.
Q. What sort of observation?
A. Of constructing them and looking at plans and so forth for the last eight or nine years.

The Court: He may answer.
Mr. Walther: May I ask him a few questions?

Q. Do you know the height of the embankment there?
A. Two hundred and twenty-five feet.
Q. Have you ever gone over the topographical map of that section of the cemetery to find out how high it is above the city directrix?
A. No, sir.

The Court:

Q. You say it is two hundred and twenty-five feet higher than Broadway?
A. Yes, sir; the apex of the slope.

Mr. Walther (resuming examination):

Q. How many acres of the cemetery are in the natural water-shed there?
A. Which way?
Q. From the sewer to the northeast?
A. That I don't know.
Q. You don't know that?
A. Only from hearsay.

The Court: Well, he said it runs back about——
The Witness (interrupting): One thousand feet long and about five hundred feet back, and all of that portion of Calvary Cemetery towards Broadway.

Mr. Walther (resuming examination):

Q. What is the drainage of Calvary Cemetery along Broadway, the entire drainage?
A. About eighteen hundred feet.
97 Q. And then this open sewer begins at Calvary avenue, which is the south boundary line of the cemetery, doesn't it?
A. Yes, sir.
Q. And runs to the center gate, and then from the center gate there is an underground sewer, which runs as far as the Baden Public Sewer?
A. Yes, sir.
Q. The slope is downgrade all the way to the Wabash Bridge, isn't it?
A. Yes, sir, the slope is, but the water-shed isn't that way.
Q. The water-shed isn't?
A. No, sir; the ground slopes that way.
Q. Wasn't all the surface water there drained into an inlet in the old Broadway sewer at the bridge?
A. No, sir.
Q. Before you built yours?
A. No, sir.
Q. Didn't you disconnect the Calvary sewer with or from that Broadway sewer and the inlet there?
A. No, sir.
Q. Haven't you now got a large inlet right at the Wabash Bridge into this Calvary sewer?
A. I never put any in there.
Q. You say there isn't an inlet right on Broadway right at the Wabash Bridge now?
A. I don't know whether there is or not.
Q. So—have you examined this work since it was done by your father?
A. I didn't put any inlet into the Calvary sewer connecting from the inlet at the Wabash Bridge; I didn't connect that up to the Calvary Cemetery sewer.
Q. And then, as I understand it, any surface water that originally drained down into the Broadway sewer into that inlet at the Wabash

Bridge has not been diverted into the Calvary Cemetery sewer which your company constructed?

A. I don't know whether it has been diverted or not, but
98 I didn't put any in there.

Q. When you finished your work, there was no connection of that inlet into your sewer?

A. That is right.

Q. Now, isn't the drainage there, as you say, about eighteen hundred feet from Calvary avenue off to the Wabash Bridge?

A. Approximately that.

Q. When you say that the drainage was only one thousand feet, you are going on the theory that the eight hundred feet to the north were not in this water-shed?

A. The eight hundred feet to the north is that portion which flows is to the Wabash right-of-way tracks; it doesn't fall on Broadway, because it makes a turn there and goes west.

Q. I don't get how you take that out of this natural water-shed?

A. Because the hill there is west there and it finds its way into this sewer passage.

Q. This is what I mean: Isn't that what you mean by the natural water-shed, when the water flows in the same general direction and unobstructed would find its final outlet at the same place?

A. Yes, sir.

Q. Now, in expressing an opinion upon the capacity or sufficiency of this open sewer, you are not taking into consideration those northern eight hundred feet?

A. That doesn't drain into that open sewer, because the open sewer is only eight hundred feet long.

Q. But then you have the covered sewer which is a part of the work you did, and it drains part of this hill, doesn't it?

A. Yes, sir; it drains a part of the hill and there is an inlet right at the manhole with the grating on the top, right at the angle formed by the sewer where it turns west.

99 Mr. Walther: Well, I want to object to the witness answering the question as put, as it is plain that he is not taking into consideration all of the factors; he has been asked a question, or an opinion as to whether or not this sewer was sufficient, and he don't take into consideration all of the factors.

The Court:

Q. I suppose you have observed the surface of the land there many times?

A. Yes, sir.

The Court: I think he is sufficiently qualified and I will let the answer stand. The objection goes to a matter of weight rather than competency.

To which action of the Court plaintiff then and there excepted and still excepts.

Mr. Walther (resuming examination):

Q. Have you ever made any investigation as to the water flow out there?
A. Yes, sir. Off the Calvary slope?
Q. Yes, sir.
A. Yes, sir.
Q. When?
A. Last winter, in 1917.
Q. When this work was being done?
A. After this work had been done.

Mr. Walther: That is the plaintiff's case.

Thereupon, the defendant, to support the issues upon its behalf, offered and introduced evidence as follows:

100 *Defendant's Evidence.*

JAMES A. HOOKE, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Taylor:

Q. What is your name?
A. James A. Hooke.
Q. What is your present vocation?
A. I am director of Public Utilities for the City of St. Louis.
Q. What was your business or vocation in 1913, November, 1914, February, 1914, and May?
A. Well, I think, in 1913, I was probably assistant sewer commissioner. I don't know what time I was appointed Sewer Commissioner, but it may have been along in that time; I can't say exactly the dates.
Q. Do you remember whether you were Sewer Commissioner as early as May the eighth?
A. I couldn't unless I had the records looked up what time I was made Sewer Commissioner.
Q. Now, do you remember the question that arose in the board—did you participate in the meetings of the board?
A. When I was Assistant Sewer Commissioner I occasionally participated.
Q. Now, in those meetings, do you remember the board having under consideration the question whether or not the surface drainage or the surface of Calvary Cemetery should be or not be included in the assessment district to pay the cost of Baden District Sewer Number Two?
A. Well, undoubtedly they had that under discussion; but I don't remember the exact details of it at the present, however.

101 Q. On May eighth, do you remember at a meeting of the board, at which the location of the district was unanimously agreed to by the board——

A. (Interrupting.) Well, I couldn't say the date.

Q. Well, were you present at the time?

A. I couldn't say even that unless the records would show that.

Q. Well, look and see. I am referring to this record which has been identified (here handing the witness a paper)?

A. Yes, that is supposed to be a committee report; that is during the board meeting; whether there was a regular meeting or a committee meeting I couldn't say.

Q. But the board at that meeting unanimously agreed to the location as made?

A. Yes, sir.

Q. Now, do you remember how long they had had under consideration the locatioon?

A. Do you mean the location of the district?

Q. Yes, sir; that is to say the property to be included in it?

A. I couldn't tell you how long, but probably some time before that; quite a little time before that, evidently.

Q. Do you remember an occasion as early as the eighteenth of November that they had that question up before the board at a committee meeting, November eighteenth, of the Baden District Sewer Number Two, all members present? Glance over that and see.

A. I don't imagine I was present at this meeting. I think Mr. Moreno was Sewer Commissioner at that time; I notice from the memorandum here.

Q. Now, did you in the discussions, both as to the Calvary Cemetery Association, as to whether or not it should be included in the assessment district, and the Kuhs property, did you take

102 part in those discussions and in the consideration as a member of the board?

A. I probably did later when I was Sewer Commissioner, and I probably did when I was Assistant Sewer Commissioner, with the Commissioner.

Q. Now, the question was up as to whether or not the Kuhs property should be included in the assessment district, was it?

A. I don't know as that question was up; but the question was discussed; yes.

Q. Now, was an examination, and did you make an examination to ascertain the position and condition of the Kuhs property, as to whether or not it was properly sewered, so as to not need further sewerage?

A. I couldn't say that I did it, but evidently it was done, for we never permit any sewers to be left that way, where they would in any way likely cause any trouble in the future, if it is possible to not take them up.

Mr. Walther: I ask that the latter part of the answer be stricken out as not being responsive to the question and as it is entirely immaterial.

Mr. Taylor: I think it is responsive in this, that it details the course and manner of business of the board.

Mr. Walther: The answer of the witness was that he supposed they did it in this case, because it was their practice in other cases.

The Court: Objection sustained.

The Witness: That is rather a long time.

Mr. Taylor: The object of my inquiry was to elicit the manner in which they disposed of such business. The course of conduct; I think that that is competent.

The Court: I felt inclined to rule it out, if either side objected to it, but since you didn't, I will let it go in.

103 Mr. Taylor: I will not press it further.

Mr. Taylor (resuming examination):

Q. Now, as a fact, do you know that the Kuhs property was abutting on this northern boundary, abutting on the Baden public sewer? You know that, do you or not?

A. Well, I know that.

Q. Was that for a considerable space along the northern border of the Kuhs property, the Baden public sewer touched their property?

A. I know that at some places; but I couldn't tell you how much or anything of the kind.

Q. And you don't know in how many places there were connections made? I mean, having no reference to Baden District No. 2—you don't know how many connections already existed from the Kuhs property with the Baden public sewer?

A. No, sir; the records would have to show that; that is what I would go on.

Q. You wouldn't remember that?

A. No, sir.

The Court: The plats show that.

Mr. Walther: The official plat shows only one connection.

Mr. Taylor: But the connections, your Honor, as your Honor has understood—this Baden public sewer was built in the bed of Gingrass Creek; Gingrass Creek, the bed, had formerly performed the functions of a sewer; and those persons who abutted Gingrass Creek had their connections with that creek; and when the sewer was made, they made the connections with the Baden sewer.

The Court: Yes. Well, there is only one connection made, as I remember the testimony.

Mr. Walther: That was a 15-inch pipe which paralleled our 24-inch pipe.

104 Cross-examination.

By Mr. Walther:

Q. Mr. Hoke, you also knew that the sewer system of the St. Louis Malleable Casting Company was drained along a private right-of-way into the Baden public sewer, did you not?

A. No, sir; I did not.

Q. You haven't made any examination of the conditions up there yourself?

A. As I stated a few minutes ago, probably we did through the office, but I didn't do it personally; probably some of the other engineers did at that time.

Q. Well, Mr. Hooke, you were present, were you not, at a conversation between Mr. Moreno, who was then Sewer Commissioner, and Mr. Edward L. Kuhs, respecting the giving of a right-of-way deed for this district sewer?

A. Well, I can't say whether I was or not; that would be pretty hard for me to remember anything of that kind.

Q. Do you recall, to refresh your recollection, do you recall ever being present at such an interview, when Mr. Moreno, as Sewer Commissioner agreed that if a right-of-way was given by the Kuhs Real Estate Company for this district sewer, the property of the Kuhs Company would be exempted from taxation for this district sewer?

A. I don't recall anything of that kind, Mr. Walther.

Q. To refresh your recollection on that matter, I call your attention, Mr. Hooke, to a statement by yourself at a meeting of the Board of Public Improvements, sitting as a committee of the whole, on May the eighth, 1914, being the same meeting to which your attention was called by Mr. Taylor a few moments ago, in which, according to the transcript in evidence, you are reported to
105 have stated in answer to a question: "Q. What had you done about the Kuhs property?" Your answer being: "Nothing, for two reasons; the first is he gave us all of those rights-of-way; I was sitting in there with the Sewer Commissioner myself, on condition that his sewers that were in there would be accepted and if his sewers are accepted, there is no reason why we should put him in the district." And later on, in the same meeting, speaking of the Kuhs property: "If his land was on the high side you couldn't do it, but being on the low side, I do not see anything wrong with it, especially in view of the fact if we don't do that we must pass an ordinance and give him back those rights-of-way which were obtained under a misrepresentation." Refreshing your recollection by the statements in this transcript, do you now recall being present at any meeting or conversation between Moreno and Kuhs?

A. Evidently that transcript is correct; I couldn't say that I remember that conversation other than what is written there.

Q. It doesn't refresh your recollection on having been present at the conversation.

A. No, sir; we probably had a great many of them, as you have in mind, when you were City Counsellor. I can't recall that at the present time, although I have no doubt that that is quite correct as it is written there.

Q. Your department did obtain from Mr. Kuhs a right-of-way deed for this district sewer, did it not?

A. The records would show that.

Mr. Taylor: Nobody disputes the fact but that Kuhs deeded them a right-of-way; Kuhs gave them a right-of-way.

Mr. Walther (resuming examination):

106 Q. I show you a right-of-way deed from the Henry W. Kuhs Realty Company to the City of St. Louis, which has just been handed to me by Mr. Horner, and I will ask you whether or not that deed was obtained by your department at that time from the Henry W. Kuhs Realty Company?

A. Well, I presume it was; we had several right-of-way men, and I don't know who got this. Probably Mr. Deer might have gotten this, and he probably could give more competent testimony than I can.

Q. Didn't you, yourself, have negotiations with Mr. Kuhs while Assistant Sewer Commissioner about that right-of-way?

A. In all probability; yes.

Q. But you don't recall it now?

A. More likely I did.

Q. But you don't recall now any of the circumstances?

A. No, sir.

Q. Did you also have any talk with any representative of the St. Louis Malleable Casting Company regarding the giving of a right-of-way by that company for this same district sewer?

A. I don't recall it at all, whether I did or not. Probably, if we needed the right-of-way, we had those conferences.

Q. Did you make a statement to the board on May the eighth, 1914, to the effect, as I have read it to you? That, I take it, was undoubtedly a correct statement of the proceedings at that time?

A. What particular statement was that?

Q. The statement I read to you a few minutes ago, when the right-of-way deed matter was up and it was given on condition that the Kuhs sewer system would be accepted, and also that if the property was not left out of the taxing district that it virtually would

107 have to be returned?

A. Well, I presume that that probably is from my statement there, if analyzed.

Q. Answer, first, my question as to whether whatever representations were made to the board at that time was necessarily true?

A. I have no doubt but what Mr. Weir took me down approximately correct.

Q. And, of course, you wouldn't have reported anything to the board which wasn't correct and true at that time?

A. That is hardly a fair question to ask me that.

Mr. Walther: I will withdraw that question.

C. A. MORENO, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Taylor:

Q. What is your name?
A. C. A. Moreno.
Q. What is your present vocation?
A. I am the president of the Moreno-Barton Construction Company.
Q. In November, 1913, February, 1914, and May, 1914, what connection did you have with what is known as the Board of Public Service?
A. On the first two dates mentioned I was a member of that board, and on the third I had no connection with them, having resigned in April, 1914.
Q. You resigned in April, before May?
A. Yes, sir.
Q. Now, your connection with the board was that of what?
A. Sewer Commissioner.
Q. As a member of the board did you have occasion as
108 Sewer Commissioner to inquire into the condition of sewerage of what is known as the Kuhs property?
A. I remember that that question was discussed before the board while I was a member.
Q. Now, the question was discussed with a view of determining whether the Kuhs property would be benefited by this sewer, and, therefore—that is, Baden district sewer number two—and therefore whether or not it should be included in this assessment district?
A. I remember that that matter was discussed by the board, but it has been five years ago and I can't recall just the particular facts; what matter we did discuss.
Q. For how long a period—well, do you remember the date of the beginning of the discussion?
A. Why, I have recently looked over this transcript, and that is the only way that I can identify the dates, and that transcript of the discussion by the board I presume is correct, and if that is the case, we discussed it on the first date you mentioned.
Q. That is, in November?
A. Nineteen thirteen.
Q. And afterwards, in February, 1914?
A. Yes, sir.
Q. When was it determined that the sewerage system or condition of the Kuhs property didn't require any service from this Baden district sewer number two?
A. I don't know when that was determined.
Q. You don't know when that was determined?
A. No, sir.
Q. Now, it appears from that record that it was determined May 8th, and that was after you left the board?

A. Yes, sir.

Q. Now, did you have in consideration, as member of the board, the question as to whether or not the service of Calvary
109 Cemetery, the surface drainage of Calvary Cemetery, would require the need of this sewer district, Baden number two?

A. I remember that matter was discussed before the board, also, but I don't recall the details of the discussion.

Q. Do you remember how it was served?

A. It was not served up to the time I left the board.

Q. So both conditions, that is to say, as to the Kuhs property and as to the Calvary Cemetery property, both of those questions, that is to say, the question as to whether or not they would be included, or you would have a right to include them in the assessment district, was still open at the time you resigned?

A. It was.

Q. Your duties as a board was to include such property in the assessment district as would be benefited by the sewer?

A. Yes, sir.

Q. That is the fundamental rule that guided you in all of those matters?

A. Yes, sir.

Cross-examination.

By Mr. Walther:

Q. Well, that was determined mainly by the fact of the property being in the natural drainage basin, was it not?

A. Yes, sir.

Q. And so when this question of the leaving out of the Calvary Cemetery came up, you called the attention of the board to the fact that there were some twenty-two to twenty-three acres of Calvary Cemetery which was in this drainage basin?

A. I might have done so; I presume the record shows; I don't recall.

Q. You have read through the transcript of this meeting at which Mr. Hornsby appeared before the board?

A. Yes, sir.

110 Q. And having refreshed your recollection by that don't you say that you did present that phase of the matter before or to the board?

A. Yes, sir; I do; I recall that after reading that transcript of the record.

Q. And it was because of that fact that so much of the cemetery was in the natural drainage basin of this district that you expressed the doubt at that meeting on November the 18th, 1913, that the tax bills would probably be invalid if the cemetery was omitted from the district?

A. I don't recall what was stated; and I don't remember now whether I said that according to that transcript, but whatever that says I assume to be correct.

Q. But any opinion of that kind would be——

Mr. Taylor: I object to his opinions on that question.
The Court: Objection sustained.

To which action of the Court plaintiff excepted and still excepts.

Mr. Walther: I want to get the basis for the opinion——

The Court (interrupting):

Q. Have you personal knowledge of this property?
A. No, Judge, I haven't.

The Court:

Q. Of any of these matters that came up before the board?
A. No; I have a very imperfect knowledge of it; I remember driving over that district five years ago.

The Court:

Q. You wouldn't be prepared now to give any opinion as to why it wouldn't be necessary to include these properties in this sewer district?
A. No, sir; I would not.

Mr. Walther (resuming examination):

Q. So far as the physical conditions are concerned, you
111 relied upon the reports of your engineers who had examined the grounds?
A. Yes, sir.
Q. And you had to do that in most cases?
A. Yes, sir, I did.
Q. Mr. Moreno, do you recall, having refreshed your recollection by examination of the transcript of these proceedings before the board, any negotiations which you had with Mr. Edward L. Kuhs, regarding a right-of-way for the Baden District Sewer Number Two?
A. No, sir, I do not. I have no recollection of ever having discussed the matter with Mr. Kuhs. I read that transcript of evidence with a view to try and recall those matters to my mind, but I don't remember ever having talked to him at all about the matter, and I wouldn't know him if I should meet him today in this room; I don't know as he is here.
Q. I take it you don't mean by that to say that this transcript of what you said, or was purported to have said, isn't correct?
A. Absolutely not; I just have no recollection of the matter as it has been five years ago, and I can't recall it.
Q. Do you recall taking the right-of-way from the St. Louis Malleable Casting Company for the same district sewer?
A. No, sir.

E. R. KINSEY, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Taylor:

Q. What is your name?
A. E. R. Kinsey.
Q. And your vocation?
A. I am at present the president of the Board of Public Service.
112 Q. What was your vocation in November, 1913, February, 1914, and May, 1914, and thereafter?
A. On those dates I was president of the Board of Public Improvements, the predecessor of the Board of Public Service.
Q. Do you recollect your board having under consideration the question of including whether or not the property of the Kuhs Realty Company, I believe, and the surface of a part of the Calvary Cemetery, whether or not you had the right to include those pieces of property in the assessment district?
A. I recall that we had a very considerable discussion on that question.
Q. Now, did you have investigation made as to conditions of the sewerage of the Kuhs property?
A. Yes, sir; we went into that very thoroughly.
Q. And as a conclusion you determined that you would leave it out, except a part of it?
A. Our final conclusion is expressed in the assessment district, which we recommended.
Q. That was the conclusion?
A. That was our final conclusion.
Q. Both as to the Calvary Cemetery and as to the Kuhs property?
A. It was.

The Court:

Q. Have you any personal knowledge now as to the facts upon which you based that conclusion?
A. Yes, I recall the substance of it.

The Court:

Q. What I would like to know is why you left those properties out of that sewer district?
A. Will I explain that?

The Court: Yes, sir.

113 A. In the first place, with respect to the cemetery property, the center of it lies entirely on the west of this district, and is property which will not in all probability ever be built up with houses, and therefore all the drainage from there is surface water

due to rains, and if the owners of the property, or their representatives, expressed the desire to build a sewer along the west side of Broadway, and accept all the surface drainage coming from the cemetery property and carried direct to the sewer, so that none of their drainage would enter into this proposed district or into the sewers in the proposed district; and, with that provision having been made, it was the judgment of the board that it was fair to exclude that area from the sewer district, because none of the water would enter into the sewer. There was this further consideration, that if that area had been included in the area to be drained, then the sewers carrying through this district from the west side of Broadway would have to be larger, and it would have increased the size of all the main sewers through there; therefore, by excluding it and permitting this drainage to be carried to the main sewer, we could design the plans of the sewer in a smaller size.

Mr. Taylor:

Q. With reference to the Kuhs property?

A. That was an area lying immediately adjacent to the main sewer itself. It is property that lies with the drainage which, if I recall it, went directly to the main sewer and did not need the intervention of any additional sewers to carry the drainage to the main sewer, and it was already sewered, and sewers of a nature which with slight alterations would be acceptable as permanent sewers; and there was none of the drainage in that area which would
114 naturally go through the rest of the sewers designed in that district; and for that reason we didn't conceive it just to assess the property, because the sewer designed to surround it was of no service to the property as it had its own sewers.

The Court:

Q. But they attached their sewers to the public sewer when you had it built, and so it must have been of some benefit?

A. Not to the sewers built in this district.

The Court:

Q. To the previous sewers of the Kuhs property?

A. My recollection is that they were connected to the Baden public sewer; not to the district sewer.

Mr. Taylor (resuming examination):

Q. I will ask you this general question, Mr. Kinsey: In the consideration of the question of the location and the property being included in the assessment district, did you ever hear or see or have any suggestions made to you that any impropriety on the part of any member of the board was inciting or moving him in the matter?

A. Absolutely not.

Mr. Walther: There isn't any such charge in the petition; there is no charge of corruption against any member of the board.
The Court: Well, that would be very serious, I take it.

Mr. Taylor:

Q. Well, was there any favoritism or disposition to show favor to anybody?
A. No, sir. I don't ever recall of ever having heard that property desribed as the Kuhs property until that discussion was heard. We treated it as something to be determined by the physical conditions on the ground.

115 Cross-examination.

By Mr. Walther:

Q. You heard it described as the Kuhs property at this discussion before the board?
A. I don't recall that it was so designated.
Q. Was the transcript which has been offered in evidence in which it has always been referred to as the Kuhs property, and was it referred to in any other way?
A. The property was fixed in my mind as being a certain subdivision; but I know what property you are referring to now.
Q. Had you gone out there before passing upon this proposed ordinance for the taxing district and examined it yourself?
A. I did, and before that; and I have been ever since quite familiar with the situation.
Q. Then you knew that the Kuhs property included a large number of dwelling houses, houses for some one hundred families?
A. I knew there was a large number of small dwellings there.
Q. And you also knew that the plant of the St. Louis Malleable Casting Company was connected with this same public sewer over a private right-of-way, did you not?
A. If that was the fact I knew it, but I don't recall all the details now.
Q. And do you recall investigating and finding out that the property of the St. Louis Malleable Casting Company was fully sewered and had greater sewer facilities than the entire Kuhs property?
A. No, sir; I don't recall any such thing as that.
Q. You say that one of the considerations that moved the board to eliminate the Kuhs property was the fact that part of the property is immediately adjacent to the Baden public sewer, and so that there could be direct connections made between the public
116 sewer and their private system?
A. And so there was direct connection made which existed at the time.
Q. Now, the private right-of-way, sewer right-of-way, of the St. Louis Malleable Casting Company extended to the public sewer and its system had also been connected with the Baden public sewer

before you laid out this district for Baden Sewer Number Two, had it not?

A. I don't know; I don't recall all the details; if it were a fact, then I knew it, because we made a thorough investigation.

Q. What was the basis for the differentiating between the property of the Kuhs Realty Company and that of the St. Louis Malleable Casting Company?

A. I am not sure that I recall the difference, but there was one unquestionably, and my recollection—and this is after several years, and must be taken according to the best of my knowledge and beliefs—is that our finding was that the Malleable Iron Company property needed the additional sewers as the surface water in that area wasn't provided for, and additional sewers were necessary to take care of the water on that area, and, therefore, this sewer was a benefit to that property.

Q. Why was the little strip, fifty feet in width, of the Kuhs property, on the east, included in this taxing district?

A. Again, I say I cannot recall from a matter of memory, but it is almost apparent on the map itself that it was included because of the fact that the sewer in the right-of-way adjacent actually served that portion of the Kuhs property, and, therefore, it was assessed to that extent.

Q. As shown in this plat, there were places left for con-
117 nections with this district sewer for the purpose of serving the Kuhs property, at least that part of it along the eastern front?

A. Yes, sir; that is evident.

Q. But why did you assess then only a depth of fifty feet from the line of the sewer, if the sewer was so constructed as to permit of connections along there with the Kuhs property?

A. I have no doubt that it was because of the judgment of the board only fifty feet would be served by the sewer.

Q. Now, if you recall, what facts were there which induced the board to assess only a depth of fifty feet, when the facilities for connecting with that tract were provided in the construction of this sewer?

A. I don't recall that at this time. I came down here without knowing what the case was going to be and without making any preparation or any effort to refresh my memory.

Q. I also call your attention to the fact that the strip seven feet in width over the western part of the Kuhs property, and an easement in which was deeded to the city for this district sewer, was included in the taxing district. Can you explain why that strip of seven feet was included and the remainder of the Kuhs tract excluded?

A. No, sir; I don't recall that; this is like many other matters that come before the board; we go into it thoroughly and reach a conclusion, and then I dismiss it from my mind and go into the next piece of business, and the details I forget after three or four years.

Q. And do you not recall that one of the chief considerations discussed by Mr. Moreno, when he was Sewer Commissioner, and also by Mr. Hooke, when he succeeded Mr. Moreno, for cutting out the

Kuhs property, was the fact that Kuhs had given a right-of-
118 way for this district sewer?

A. No, sir; I do not recall that there was any element of trade in it whatever, but that the judgment of the board was based on physical conditions.

Q. You don't recall those statements, which the transcript of these meetings shows were made by Mr. Moreno and Mr. Hooke, or such representations having been made, as a consideration for the right-of-way deed?

A. I haven't looked over what you call the transcript, but I know to what you refer, and I can say that that doesn't purport to be a full record of everything that was stated; it is a report of conversations held at an informal meeting.

Q. The stenographer yesterday testified, I think, Mr. Kinsey, that it was a full report of everything that transpired at the meeting, and I based my question on that; was the Kuhs property ever laid out by the board and by ordinance of the city as a separate sewer district?

A. I don't recall if it was.

Q. So far as you know, Mr. Kinsey, there has never been, by any action of the Board of Aldermen, or based upon recommendation of your board, any acceptance of the private system in the Kuhs property as a sewer district?

A. I don't remember that such an action had taken place.

Q. Mr. Kinsey, there was no notice to the property owners of the proposed taxing district, or any hearing prior to the recommendation by your board of the ordinance establishing the taxing district, was there?

A. No, sir; there was no such hearing required by law.

Q. The Charter doesn't provide for any such hearing, so
119 you had none; that is correct?

A. Yes, sir; that is correct.

Q. Well, there wasn't any so far as you recall?

A. I don't recall that there was any advertised hearing, but there was a good many informal hearings on the part of the property owners coming up there to discuss the matter.

Q. Was there any written contract under authority of an ordinance or the Board of Aldermen between the city and Calvary Cemetery, whereby the Calvary Cemetery obligated itself to construct a sewer along Broadway to take care of the surface water?

A. No; that sewer was built wholly on private property, on their own property, and it is in such a position as to accept of their drainage from their property going toward Broadway.

Q. Was there any authorized contract entered into between the city and that association, so far as you know, whereby, in consideration of their constructing that sewer along Broadway they would be eliminated from this district?

A. We couldn't make any such contract as that; of course not.

Redirect examination.

By Mr. Taylor:

Q. The strip of the Kuhs property included in the taxing district is fifty feet east and west, by a length north and south of the whole length of the propery, some five hundred feet; is that not true, at least the whole length of the property?

A. Yes, sir; at least the entire length of the property.

Q. That seven and one-half-foot right-of-way was put in there, do you know for what purpose? It was for the purpose of a
120 right, but it was included in the district. Well, do you know why it was put in?

A. Let me see which right-of-way you are referring to.

Q. On the western boundary of the Kuhs property?

Mr. Walther: The district sewer is laid in that right-of-way, and I suppose Mr. Taylor's idea is that you had to include all the property in which any of the sewers might be laid.

Mr. Taylor: Yes. That is all.

Recross-examination.

By Mr. Walther:

Q. Do you know whether or not there is any sewer in the Kuhs property north of the prolongation of Blase avenue, to serve all of those houses on the Terminal strip or Blase avenue, or Christian avenue?

A. I only know this in a general way, that at the time we had that matter under consideration, we knew there were sewers there serving the property connected with the public sewer, but the exact location I cannot testify to at this time.

Q. You don't recall now that the only sewer in the Kuhs property was south of Blase avenue and connected with a fifteen-inch pipe running into the public sewer?

A. No, sir; I don't recall that, and I doubt if that is a fact.

Edward L. Kuhs, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Taylor:

Q. What is your name?

A. Edward L. Kuhs.

Q. What is your business vocation?

A. Real estate.

121 Q. What relation have you with the property described in this suit as the Kuhs property?

A. I am the secretary and treasurer of the Henery W. Kuhs Realty Company.

Q. What relation did you have with that property as early as November the eighteenth, 1913, up to the present time?

A. I was secretary and treasurer of the Henry W. Kuhs Realty Company.

Q. Now, did you have occasion to meet persons connected with the board, that is the board and its officers, with reference to the question of the inclusion of the Kuhs property as described in this assessment district?

A. Yes, sir.

Q. You may state to the Court, as far as you may, the condition existing at the time and prior to the time of the construction of Baden District Number Two, of your property with reference to the sewerage?

A. Why, in regard to that, before the Baden District Number Two was ever laid out, we had and have today a perfect sewer system, draining all of our properties, every bit of it, and since the Baden District Number Two has been installed, we have never had any occasion, nor will we have any occasion, to use the Baden District Number Two in any shape or form.

Mr. Walther: I ask that that be stricken out as simply an opinion of the witness, and he isn't shown to be qualified to pass upon that question, as to whether those sewers that are in there are going to be adequate to serve that property forever.

The Court: Objection and motion overruled. He may answer.

To which action of the Court plaintiff then and there excepted and still excepts.

122 A. Since Baden District Number Two has been installed, this sewer has still given us the same satisfaction as it gave us before, and we have had no occasion to use, nor do we intend to use, the Baden District Number Two sewer.

Mr. Taylor (resuming examination):

Q. I will get you to state to his Honor the sewer to which your sewer sends its burden?

A. In the public sewer—connected into the public sewer.

Q. That is called the Baden Public Sewer, isn't it?

A. Yes, sir.

Q. And it is a distinct general public sewer?

A. Yes, sir.

Q. It is distinct from the Baden District No. 2?

A. That is correct.

Q. Now, that Baden Public Sewer, for what distance along the northern border of your land does it touch your land?

A. Why, we have given a right-of-way and it goes through our land, and it makes a turn there, and it goes partly through the eastern portion and the northern portion of our land.

Q. For how long a period of time has your land been served by the Baden Public Sewer?

A. I don't recall the year, but it has been, I should judge, six or

seven years or more; but I don't recall the years, but it is six or seven years.

Q. Now, was there any necessity, as far as you as an owner of realty could see, any shortage in your drainage at all?

A. Absolutely none.

Q. At the time of the building of the Baden District Sewer No. 2, and now, the sewerage is in what condition?

A. Why, they are answering all purposes in every respect; we have, as I say, no occasion to use, or do we ever intend to use,
123 the Baden District Sewer. We have no use for that.

Q. Now, something has been said about this portion of your property, fifty feet wide, the whole length of your property, fifty feet in width by about two hundred feet in depth; is any part of that—although I informed you you have the perfect right to make that connection whenever you want to—well, you never have had occasion to connect those fifty by two hundred feet with that sewer in any way?

Mr. Walther: I object to that as wholly immaterial that Mr. Kinsey, himself, suggests that provision has been made there for connection, and they can do it whenever they want to and nobody can stop them.

The Court: Objection sustained. I don't know as it is material one way or the other.

Mr. Taylor (resuming examination):

Q. Now, how many connections has your property with the Baden Public Sewer?

A. We have one fifteen-inch pipe and two twelve-inch pipes. That is, they are connected with it.

Q. How far separated along the line of your property are those three sewers apart from each other?

A. Well, I don't know the exact distances, but the fifteen-inch sewer serves the alley on the south side of Blase avenue; there is a fifteen-inch main going down there, and it makes a turn and goes into the public sewer near the conduit bridge.

Q. Wait one moment. With reference, now, to that first sewer mentioned, is that the easternmost of your sewer connections with the Baden Public Sewer?

A. Yes, sir.

Q. Now, the next western connection is how far west?

A. Well, that is a little hard to say, for the fact that the
124 public sewer makes a turn. You understand, it comes up from the river, and after it hits the conduit bridge it makes a turn; that is, a gradual turn, to the north.

Q. You can't be specific as to the distance of the separation?

A. No, sir, I wouldn't like to say that.

Q. And as to the next sewer connection, how is that?

A. The next sewer connection is in the line with the alley and on the south side of Christian avenue.

Q. Now, are those sewers now, and have they heretofore always been, sufficient to drain all the sewage of your ground?
A. Positively.
Q. Positively no?
A. No, positively yes; they have always been.
Q. Now, those three sewers—when were those connections made with the Baden Public Sewer?
A. I don't recall exactly the date, but at the time they were building the public sewer the contractors were Hartman and Hogan, and they made the connections as they went along. In other words, the connections were probably made before the public sewer was entirely completed.
Q. It was made pending the construction of the sewer?
A. No, sir; it was made during the construction of the sewer.
Q. Now, some point was made here about there not being a permit: How do you account for that? Have you permits for those connections?
A. Well, I suppose I have, but I don't know; that is a good, long time ago, and I don't remember.
Q. Well, your connections have never been interfered with by the city?
A. None whatever.
125 Q. Now, we will come now—what is the condition of your neighbor there, the Malleable Iron Company, on the south? What kind of a building or plant have they?
A. Well, they have a foundry plant there.
Q. A what?
A. A foundry; do you mean the conditions of the building?
Q. Yes, sir; how large it is and how much area it covers?
A. Well, I don't know the full amount of ground that they cover.
Q. The property of the Malleable Casting Company doesn't touch the Baden public sewer at any point, does it?
A. No, sir.
Q. But it is touched on the south by Baden District No. 2, is it not?
A. What?
Q. By Baden District Sewer No. 2?
A. Do you mean whether the district sewer touches it?
Q. Yes, sir.
A. Well, the sewer has been built all around it.

Cross-examination.

By Mr. Walther:

Q. Well, that same thing is true of your property, isn't it? That the Baden District Sewer No. 2 is built around most of it?
A. Well, I suppose it is, but not all around it, but the majority of it anyway.
Q. For instance, along the whole length of your property on Christian avenue, you have the district sewer, and along the east front of your property you have the district sewer, and along the

full half of the west line of your property you have the district sewer, haven't you?

A. That is very true; but the only way that they can get into the sewer is down there.

Q. That is, by going around the south part of the Malle-
126 able Casting Company's plant, too, wasn't it?

A. I suppose so; that is correct.

Q. Your company gave to the City of St. Louis a deed for a right-of-way of 7½ feet in width and a total length, I think, of 271 feet, something like that?

A. Something of that character. I don't remember the exact figures or anything of that sort.

Q. Off of the west line of your property?

A. Yes, sir.

Q. And part of this district sewer has been laid in that right-of-way?

A. That is correct.

Q. You obtained no money consideration from the city for this right-of-way deed?

A. What do you mean?

Q. Did they pay you anything for it, that is, the city?

A. Well, I don't know, but I don't think so.

Q. Don't you recall?

A. No great amount, if they did, I am sure; there may have been one dollar consideration, but I don't know.

Q. Did you ever get one dollar from the city for it?

A. That I don't know.

Q. Well, the fact of the matter is, isn't it, Mr. Kuhs, that you were solicited by somebody from the Sewer Department to give this right-of-way to the city?

A. Whether I was, or whether we were?

Q. Yes, sir?

A. I suppose we were; there is no doubt of that.

Q. Well, did you have any talks with Mr. Hooke or Mr. Moreno, before this right-of-way deed was given?

A. Oh, yes.

Q. About whether or not your property was to be taxed for district sewer?

A. Whether or not? Well, the conversations that we had
127 in regard to that was the fact that I brought up the matter that they should not pay taxes for the fact that they had a sewer.

Q. No, I am asking you whether or not these conversations that you had about your property not being taxed took place before the giving of this right-of-way deed?

A. Well, I don't recall that; I don't know; that has been a good many years ago, and the exact conversations and whether it was before or after, I do not recall that; not exactly.

Q. Mr. Kuhs, you say you now have three connections with the Baden public sewer?

A. Yes, sir.

Q. The fifteen-inch pipe was the one that was laid under the permit granted in 1903?

A. Well, I should judge that; yes.

Q. Well, when did you say those other two twelve-inch pipes, that you have testified about, were laid?

A. Well, the one twelve-inch pipe must have been laid approximately twenty years ago, or fifteen years ago. It has been laid when we built the first house there, I should judge. Well, 1903 is fifteen years, ain't it?

Q. Was it before the fifteen-inch pipe?

A. Yes, sir; one of them was.

Q. Well, where did that pipe start?

A. Well, it starts now from the public sewer.

Q. No, that is where it ends.

A. Well, it starts very close to the west line of our property there.

Q. And how far, say, south of Christian avenue?

A. South of Christian?

Q. How far south of Christian avenue?

A. In the back of the alley; I don't know what those alleys are; probably one hundred and fifteen or one hundred and twenty
128 feet south of Christian avenue, whatever the size of those particular alleys are.

Q. Your property along Christian avenue is improved by two-story brick flat buildings?

A. Different buildings; some two and some one stories.

Q. And there is an alley in the back of those houses and this pipe runs from the alley to the public sewer which crosses Christian avenue?

A. Yes, sir.

Q. I say, the public sewer crosses Christian avenue in a sort of a curve?

A. Yes, sir.

Q. Now, the other twelve-inch sewer, when was that laid?

A. Well, I don't recall the year.

Q. How long before this district sewer was built?

A. Well, I don't know; well, that is pretty hard to say. I don't know whether it was two or three or four years before that; I don't recall.

Q. Well, that line of pipe extends from what point to the public sewer?

A. That starts close on to Christian avenue there, and it serves four frame houses there on the east side of the public sewer.

Q. How many houses in all, Mr. Kuhs, had you on this property prior to the time when the district sewer was started?

A. Oh, I don't know; I don't know; about forty or fifty; something like that.

Q. They were housing about one hundred families?

A. Something like that; about that.

Q. And there is still a considerable part of the tract that is vacant?

A. Not such a great deal, but there is some vacant.

Q. You have private streets and alleys running through the property, have you not?

A. Yes, sir.

Q. And do you know why, or can you give us any explanation why only one of those three connections, as you have testified
129 about, was laid under a permit from the city, and it the only one that appears on the city's plat of the sewers in your property?

A. No, I can't give any absolute explanation of that. Possibly, at the time the first twelve-inch sewer was laid, it maybe wasn't the habit of the city to take out the permits, or whatever it was; I don't know. But they were laid by plumbers or drain-layers, whatever they happened to be, and why it was done I don't know.

Q. Do you know Mr. Kastrup, the granitoid contractor, who laid the sewer for the Malleable Casting Company, the twenty-four-inch sewer?

A. Well, I did know him, but not personally.

Q. Do you know Mr. Meckfessel, who was at that time a partner or associate of his, and looked after the construction work there?

A. I may have met him, but I wouldn't know him if I saw him.

Q. Did you not ask Meckfessel at the time he put in the twenty-four-inch pipe and took up the old twelve-inch pipe of the Casting Company plant, to permit the connection of your system with this twenty-four inch pipe, because you felt that your pipes at that time would not be sufficient to take care of the sewage of your property?

A. No, sir; I don't recall anything of that kind.

Q. You don't recall that?

A. No, sir; I don't see how I should have any occasion to ask for anything like that.

Q. I am asking you whether or not you did make that request?

A. No, sir; I don't recall that.

Q. How many inlets and where are they into your private system to take care of the surface water of the streets and alleys?
130 A. Well, there are several of them there; there is one near Blase avenue.

Q. Blase and what?

A. Well, I should judge between Blase and the alley of Christian avenue, somewhere in that neighborhood; I don't recall exactly somewhere in there.

Q. That is in this tract of ground, lot 4231 east?

A. Yes, sir; and then there is one near Christian avenue that I know of, and I can't describe that fully or exactly.

Q. When were those inlets put in?

A. Well, that I don't recall.

Q. Before the construction of the district sewer?

A. Yes; they were in there before that.

Q. How long before that?

A. Well, I don't know positively; several years and maybe longer

Q. Wasn't one of the conditions accepted by the Board of Public Improvements for eliminating your property from this taxing di

trict that you should provide inlets at places designated by the Sewer Department to take care of the surface water?

A. It is my understanding that we are to put any inlets at any place that the Sewer Department would see fit, at our own cost and expense.

Q. That condition was told you before this taxing district was laid out, wasn't it?

A. Yes, sir.

Q. And the Sewer Department, Mr. Horner or one of his assistants has given you a plan and designated where these inlets should be, hasn't it?

A. Yes, sir.

Q. But you haven't yet put in those inlets, have you, Mr. Kuhs?

A. No, sir; we haven't done that.

131 W. W. HORNER, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Taylor:

Q. What is your name?

A. W. W. Horner.

Q. What is your vocation?

A. I am chief engineer of the sewers, under the president of the Board of Public Service of this city.

Q. In the Board of Public Service?

A. Under the president of the board; yes.

Q. What was your vocation in November, 1913, and February, 1914, and May, 1914?

A. I was probably assistant engineer of the Sewer Department.

Q. Did you have occasion to know of the application of the St. Louis Malleable Casting Company, pending the construction of this sewer, Baden District Number Two, for a permit to connect with it?

A. No, sir; I did not.

Q. Now, are you familiar—how long have you been an engineer?

A. I graduated in civil engineering in 1905.

Q. Are you familiar with the construction and size and capacity of Baden District Number Two?

A. I am.

Q. Are you acquainted with the drainage that passes through that sewer?

A. Yes, sir.

Q. Now, with reference to the size of that sewer as it was built, what do you say as to its sufficiency to carry off the sewage?

A. The sewer was built in accordance with the statements de-
132 veloped by the engineer corps of the city, and is considered the best advice on the subject, which is possible to get at the present time.

Q. It was built to carry off the sewage of the district as laid out by the board?

A. It was built for that purpose and as nearly as practicable.
Q. It is neither too large nor too small for the district as laid out?
A. According to the best engineering opinion it is just exactly right for that district.
Q. Now, you have no recollection, you say, of the application for this permit by the St. Louis Casting Company?
A. I would have had no occasion to know of that.

Cross-examination.

By Mr. Walther:

Q. Mr. Horner, in making your calculations for the size of the sewer, you took the highest degree factor, didn't you, that were applicable to a case of this kind—there is always some leeway, and didn't you take the highest?
A. There is always a rule for the exercise of judgment in sewer designs, because it depends upon the rainfall, and we never take the highest; we presume that any sewer will be flooded at some time, and we have to reach a degree in there in which the case of that sewer is offset by more excessive rainfall.
Q. Had your department prepared plans for this district sewer some time before the ordinance establishing the district was adopted or recommended by the board?
A. I think the work was in the office about two years before the ordinance was introduced.

Mr. Taylor:

Q. How long?
A. About two years.

Mr. Taylor:

Q. Let me have that again?
133 A. I think that the office was active in this matter for about two years before the ordinance was introduced.

Mr. Walther (resuming examination):

Q. Did you reduce the size or the sizes of this district sewer after the ordinance establishing the district had been introduced, or did you take the same size that you had been figuring on throughout the two years?
A. I can't answer that at all. The work is modified and revised and checked from time to time, and it might have been changed any time up to the final ordinance.
Q. But you have no independent recollection now?
A. No, sir. But I don't remember any radical changes in the design.
Q. You don't remember any radical changes in the design?
A. No, sir.

Q. Do you know when the work of construction of this Baden District Number Two sewer was completed?
A. I don't recall it, but I think I have a record that will show that.
Q. Let us have that, please?
A. Yes, sir—no; I am sorry that the record isn't on this card, Mr. Walther.

The Court: That has been testified to, as I understand it.
Mr. Walther: No; I don't think that has been testified to.
The Witness: No; I beg your pardon, I have it here; it is marked "December Sixteenth, 1916."

Mr. Walther:

Q. That was the completion of the sewer?
A. Yes, sir.

Mr. Taylor:

Q. December sixteenth, 1916?
A. Yes, sir.

Mr. Walther (resuming examination):

Q. Have you any record of when the sewer of the Calvary
134 Cemetery was completed?
A. The record of that work was done between October twenty-third, 1916, and March fourteenth, 1917.

Mr. Taylor:

Q. Between those dates?
A. Yes, sir.

Mr. Walther (resuming examination):

Q. Did you, yourself, go up there and make a survey of the property or examine it for the plans of the laying out of the district?
A. No, sir, I did not; that work was directly in charge of the office engineer at that time, who was under me, but I didn't handle it personally.
Q. Is your office engineer who had charge of that work or matter here?
A. No, sir; he is not here.
Q. Mr. Horner, the fact that the Malleable Casting Company had a system of private sewers connected directly with the public sewer over a private right-of-way, which private right-of-way joined the public sewer, was brought to your attention before this taxing district was laid out in the way it was finally adopted?
A. That was the subject of discussion in the office, yes.
Q. Did you, in your official capacity, submit to the Board of Public Improvements any reason why the Kuhs property should be eliminated, and its private system made a separate district, and why

the same thing should not be done with the Casting Company's private system?

A. I had no occasion to take any official action of that matter, but the matter was discussed in the office and talked over with the Commissioner and Sewer Commissioner, and they took it up officially in the Board of Public Improvements at that time.

Q. Was one of the conditions for the elimination of the Kuhs property that inlets should be made to take care of the
135 surface water of the Kuhs property? That is, inlets into their private system?

A. I don't think that that can be stated to be such a condition; and, anyway, Mr. Kuhs stated that he had sewers that were satisfactory to him and the office investigation showed, that while they were satisfactory as far as carrying the sewage was concerned, that the storm water was running to the public sewer and not being handled all right; and Mr. Kuhs was advised that he would have to put in inlets and storm pipes.

Q. Has he ever done that?

A. No, sir; to my knowledge he has not.

THOMAS J. HENNESSY, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Taylor:

Q. What is your name?

A. Thomas J. Hennessy.

Q. What is your avocation?

A. Inspector in the Sewer Department.

Q. What was your business in 1913, 1914 and 1915 and 1916?

A. In those years I was rodman in the Sewer Department.

Q. Do you remember a permit being made, when the St. Louis Malleable Iron Company applied to the city for a connection with Baden District No. 2?

A. Yes, sir; I think it was in August, 1916.

Q. To what extent had the making of the sewer progressed at that time?

A. I judge about 50 per cent.

Q. It was about half constructed then?

A. Yes, sir.

Q. Did you supervise or have to do with the making of that connection for the St. Louis Malleable Casting Company?

A. Yes, sir.

Q. And it was made?

A. Yes, sir.

Cross-examination waived.

136 ARTHUR KELLER, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Taylor:

Q. What is your name?
A. Arthur Keller.
Q. What is your business?
A. I am engineer in charge of the sewer designing under the present Board of Public Service.
Q. How long have you been engineer?
A. I graduated in June, 1913.
Q. Have you been an active engineer in business since then?
A. I have been employed with the sewer design ever since my graduation.
Q. Are you acquainted with the construction and the size of the Baden District Sewer No. 2?
A. Yes, sir.
Q. Are you acquainted with the sewage designed to be carried?
A. No, sir.
Q. What do you say with reference to the size of the sewer, with reference to the sewage to be carried?
A. I would say that they were exactly correct.

Cross-examination waived.

Mr. Taylor: The defendant will rest.

Mr. Walther: I want to offer in evidence these two right-of-way deeds, and I will substitute certified copies for the bill of exceptions.

I will offer, first, a deed from the St. Louis Malleable Casting Company to the City of St. Louis, containing a right-of-way for sewer, being District Sewer No. 2, the deed being dated May 3rd, 1913, and recorded in book 2630 at page 76 in the Recorder's office of the City of St. Louis.

(Here follows blue print marked page 137.)

138 *Deed.*

Office of Recorder of Deeds,
City of St. Louis, Mo.

Chas. F. Joy, Recorder.

To whom it may concern:

Know all men by these presents that the St. Louis Malleable Casting Company for and in consideration of the sum of one dollar to it in hand paid by the City of St. Louis, the receipt of which is hereby acknowledged, does hereby give, grant, extend and confer on the City of St. Louis the right to build and maintain a sewer on the strip of ground colored red, as shown on the above plat, and the City of St. Louis may from time to time enter upon said premises and build repairs or replace the sewer aforesaid, and the right-of-way hereby granted is irrevocable and shall continue forever.

In witness whereof, the said St. Louis Malleable Casting Company has caused these presents to be signed by its President and its corporate seal to be affixed this 3d day of May, A. D. 1913.

[Copy of Seal St. Louis Malleable Casting Company, St. Louis, Mo.]

H. LUEDINGHAUS,
President.

Attest:
[SEAL.] CHAS. G. ETTE,
Secretary.

STATE OF MISSOURI,
City of St. Louis, ss:

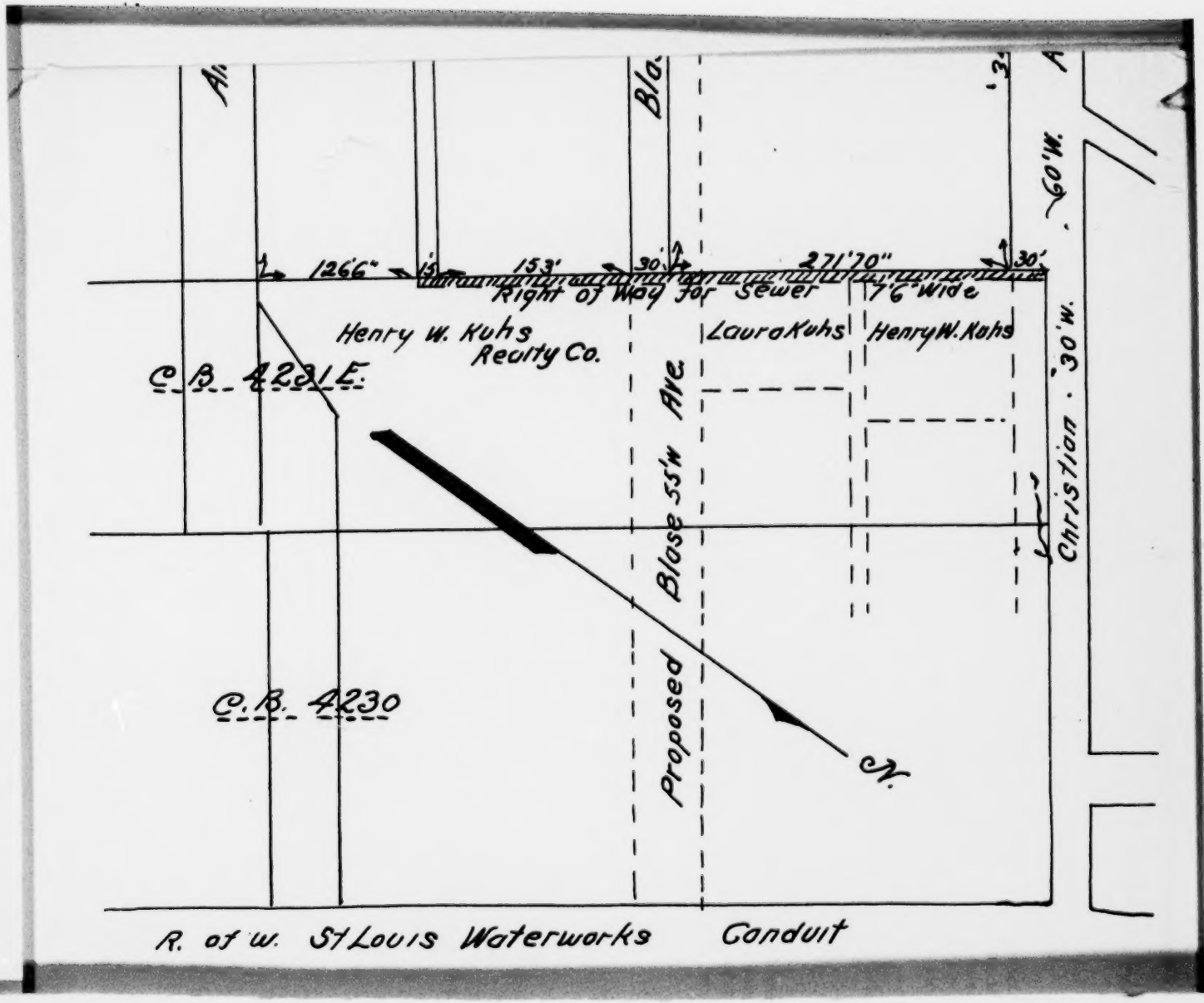
On this 3rd day of May, A. D. 1913, before me appeared H. Luedinghaus, Jr., to me personally known, who, being duly sworn, did say that he is the president of the St. Louis Malleable Cast-
139 ing Company, and that the seal affixed to the foregoing instrument is the corporate seal of said company, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said H. Luedinghaus, Jr., acknowledged said instrument to be the free act and deed of said corporation. In testimony whereof, I have hereunto set my hand and affixed my notarial seal, the day and year first above written.

[Copy of Seal St. Louis Malleable Casting Company, St. Louis, Mo.]

M. H. MURPHY,
Notary Public.

My commission expires November 12, 1913.

Broadway.
C.B. 423 2 B
320'33"
30'W.
Ave
C.B. 423 2 A.
670'
Ave.
E.A.R.R.
60'W
St.
140


126'6"
153'
30'
271'70"
30'
Right of Way for Sewer
7'6" Wide
Henry W. Kuhs
Realty Co.
Laura Kuhs
Henry W. Kuhs
C. B. 4231 E.
Blase 55'w Ave.
Proposed
C. B. 4230
Christian - 30' W.
60' W.
R. of w. St Louis Waterworks Conduit

Filed and recorded May 8th, 1913, at 11:05 a. m.

CHAS. F. JOY,
Recorder.

STATE OF MISSOURI,
City of St. Louis, ss:

I, the undersigned Recorder of Deeds for said City and State, do hereby certify the foregoing to be a true copy of an instrument of writing executed by St. Louis Malleable Casting Co. to City of St. Louis, together with acknowledgment and date of filing and recording thereof, as the same remains of record in my office in book 2630, page 76.

Witness my hand and official seal this 30th day of Aug., A. D. 1920.

[SEAL.] CHAS. F. JOY,
Recorder.

I will also offer in evidence sewer right-of-way deed from the Henry W. Kuhs Realty Company to the City of St. Louis, dated September 5th, 1913, and recorded in book 2686 at page 27 in the Recorder's office of the City of St. Louis.

(Here follows blue print marked page 140.)

141 *Deed.*

Office of Recorder of Deeds.

City of St. Louis, Mo.

Chas. F. Joy, Recorder.

To whom it may concern:

Know all men by these presents, That Henry W. Kuhs Realty Company for and in consideration of the sum of one dollar to it in hand paid by the City of St. Louis, the receipt of which is hereby acknowledged, does hereby give, grant, extend and confer on the City of St. Louis the right to build and maintain a sewer on the strip of ground colored red as shown on the above plat and the City of St. Louis may from time to time enter upon said premises and build, repair or replace the sewer aforesaid and the right-of-way hereby granted is irrevocable and shall continue forever.

In Witness Whereof, the said Henry W. Kuhs Realty Company has caused these presents to be signed by its president and its corporate seal to be affixed this 5th day of September, A. D. 1913.

[Seal Henry W. Kuhs Realty Company, St. Louis, Mo.]

H. W. KUHS,
President.

Attest:

[Copy of Seal.]

EDW. L. KUHS,
Secretary.

STATE OF MISSOURI,
City of St. Louis, ss:

On this 5th day of September, A. D. 1913, before me appeared Henry W. Kuhs, to me personally known, who being by me
142 duly sworn, did say that he is the president of Henry W. Kuhs Realty Company and that the seal affixed to the foregoing instrument is the corporate seal of said company and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and said Henry W. Kuhs acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year first above written.

[Copy of Seal Joseph F. Koehr, Notary Public, City of St. Louis, Mo.]

JOSEPH F. KOEHR,
Notary Public.

My commission expires July 25th, 1917.

To whom it may concern:

Know all men by these presents, That Henry W. Kuhs, Laura Broder and Joseph A. Broder, her husband, for and in consideration of the sum of one dollar to us in hand paid by the City of St. Louis, the receipt of which is hereby acknowledged, do hereby give, grant, extend and confer on the City of St. Louis the right to build and maintain a sewer on the strip of ground colored red, as shown on the above plat, and the City of St. Louis may from time to time enter upon said premises and build, repair or replace the sewer aforesaid and the right-of-way hereby granted is irrevocable and shall continue forever.

In Witness Whereof, we have hereunto set our hands and affixed our seals this 5th day of September, A. D. 1913.

H. W. KUHS.
LAURA BRODER (NÉE KUHS).
JOS. A. BRODER.

143 STATE OF MISSOURI,
City of St. Louis, ss:

On this 5th day of September, A. D. 1913, before me, the undersigned Notary, appeared Henry W. Kuhs, Laura (née Kuhs) Broder and Joseph A. Broder, her husband, known to me — be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and they acknowledged the same to be their free act and deed.

In Testimony Whereof, I have hereunto signed my name and affixed my Notarial Seal in the City of St. Louis, the day and year first above written.

[Copy of Seal Joseph F. Koehr, Notary Public, City of St. Louis, Mo.]

JOSEPH F. KOEHR,
Notary Public.

My commission expires July 25th, 1917.

Filed and recorded September 10th, 1913, at 9:11 a. m.

CHAS. F. JOY,
Recorder.

STATE OF MISSOURI,
City of St. Louis, ss:

I, the undersigned Recorder of Deeds for said City and State, do hereby certify the foregoing to be a true copy of an instrument of writing executed by Henry W. Kuhs Realty Company, Henry W. Kuhs, Laura Broder (née Kuhs) and Jos. A. Broder (H. H.) to City of St. Louis, together with acknowledgment and date of filing
144 and recording thereof, as the same remains of record in my office in book 2686, page 27.

Witness my hand and official seal this 30th day of August, A. D. 1920.

[Seal J. C. S.] CHAS. F. JOY,
Recorder.

Mr. Taylor: That is not in rebuttal, is it?
Mr. Walther: Well, I did overlook it, or, rather, it wasn't here at the time.
Mr. Taylor: All right.
Mr. Walther: That is our case.

At this point both sides rested their case finally.
And the foregoing was all of the evidence offered or introduced at the trial of said case.
Thereupon the Court took the case under advisement and continued the case to the October Term, 1918, of the said Circuit Court; and at said October Term, 1918, the cause still being under advisement continued the same to the December Term, 1918, of said Circuit Court.

And thereafter, to wit, on the 30th day of December, 1918, at the December Term, 1918, of said Circuit Court, the plaintiff's bill was by the Court dismissed, as shown by the record entry made at the time.
To which action of the Court in dismissing the plaintiff's bill as aforesaid the plaintiff, by its counsel, then and there objected and duly excepted and still continues to except.

And thereafter, to wit, on the 3rd day of January, 1919, at said December Term, 1918, of said Circuit Court, being the same
145 term of the said court at which the plaintiff's said bill was dismissed as aforesaid, and within four days of the dismissal thereof, the plaintiff duly filed, as shown by the record entry made at the time, its motion for rehearing in words and figures as follows:

Motion for Rehearing.

In the Circuit Court Within and for the City of St. Louis, Division 2.

No. 10468.

ST. LOUIS MALLEABLE CASTING COMPANY, Plaintiff,

vs.

GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, Defendant.

Comes now the plaintiff in the above-entitled cause and moves the Court to set aside the finding and judgment in favor of defendant and dismissing plaintiff's bill, and to grant plaintiff a rehearing, and as grounds for said motion states:

1. That the finding and judgment of the Court is against the law, the evidence and the weight of the evidence.

2. That under the law and the evidence the judgment and finding should have been in favor of plaintiff and against defendant.

3. That under the law and the evidence the Court should have found in favor of the plaintiff and against the defendant, and
146 have rendered a decree in favor of plaintiff, ordering the cancellation of the special tax bill and assessment which plaintiff by its petition prays to have canceled.

4. That the Court erred in excluding, upon the objection of defendant, competent and relevant evidence offered by plaintiff.

5. That the Court erred in admitting, over the objection of the plaintiff, incompetent and irrelevant evidence offered by defendant.

6. That the Court erred in refusing to declare void the special tax bill described in the petition, and erred in refusing to grant the plaintiff a decree canceling the said tax bill and enjoining defendant from transferring or attempting to collect the same.

7. That under the law and the evidence the tax bill described in the petition is unlawful and void, for the reason that the ordinance establishing the sewer district upon which the tax for the construction of Baden District Sewer No. 2 was levied, is arbitrary, unjust, oppressive and fraudulent.

8. Because the said tax bill is unlawful and void for the reason that the Charter of the City of St. Louis, under authority of which said tax bill was issued, prescribes a rule for the establishment of the taxing district for private sewers without regard to any consideration of the difference in benefit conferred upon the real estate coming within such arbitrarily defined district. That the said provisions of the Charter of the City of St. Louis are arbitrary and unreasonable and result in the distributing of such tax in grossly unequal proportions. That said Charter provisions and the ordinance enacted in pursuance thereto, and by authority of which the
147 tax bill described in the petition was issued, are violative of the Fourteenth Amendment to the Constitution of the United States in that they deny to plaintiff the equal protection of the laws and constitute a taking of plaintiff's property without due process of law and without adequate compensation.

9. Because said special taxbill is unlawful and void, and the assessment and levy of said tax upon plaintiff's property amounts to confiscatioon thereof for public use, constitutes the taking of property without due process of law, violates the Fourteenth Amendment of the Constitution of the United States, and violates Sections 20 and 30 of Article II of the Constitution of the State of Missouri.

10. That the ordinance establishing the taxing district, upon which the special taxbill described in the petition was based is invalid because no notice or opportunity to be heard upon the

establishment of said taxing district was given plaintiff, in violation of the provisions for due process of law of the Constitution of the United States and the State of Missouri.

11. That the Court erred in not finding under the evidence that the Board of Public Service of the City of St. Louis, in recommending the ordinance establishing the benefit district upon which the taxbill described in the petition was based, and the Board of Aldermen of said city in enacting said ordinance, acted arbitrarily and fraudulently in law.

(Signed) By MUENCH, WALTHER & MUENCH,
Attorneys for Plaintiff.

Which said motion for rehearing was by the Court taken under advisement and continued to the February Term, 1919, of said Circuit Court.

148 And thereafter, to wit, on the 17th day of March, 1919, at the February Term, 1919, of said Circuit Court, the plaintiff's said motion for rehearing was by the Court overruled, as shown by the record entry made at the time.

To which action of the Court in so overruling its said motion for rehearing as aforesaid the plaintiff, by its counsel, then and there objected and duly excepted and still continues to except.

And thereafter, to wit, on the 24th day of March, 1919, and at said February Term, 1919, of said Circuit Court in the same term of the said court at which the plaintiff's said motion for rehearing was by the Court overruled as aforesaid, the plaintiff duly filed its affidavit for appeal and appeal bond, which said bond was by the Court approved and filed; and the plaintiff prayed the Court and was by the Court allowed its appeal to the Supreme Court, all as shown by the record entries made at the time.

Inasmuch, therefore, as the foregoing matters and things, objections, rulings and exceptions, do not appear of record, and in order that they may be preserved and presented on appeal, plaintiff now, in open court, presents to the Court this its bill of exceptions and prays that the same may be allowed, signed, sealed, filed and made a part of the record in the said cause.

And now, because the Honorable Wilson A. Taylor, the Judge who presided at the trial of the said cause and during the pendency thereof was heretofore by order of the Judges of the Eighth Judicial District of Missouri, duly made and entered in general term,
149 transferred to another division of the said Circuit Court, and the Honorable Benj. J. Klene assigned to preside in Division No. 2 thereof, wherein this cause was tried as aforesaid, and in accordance therewith is now presiding in said Division No. 2, this bill of exceptions is signed by both of said Judges.

Which is accordingly done in open court this 7th day of August, 1920.

WILSON A. TAYLOR,
Judge of the Circuit Court of the City of St. Louis, State of Missouri, City of St. Louis, Presiding in Division No. 7 Thereof and Presiding in Division No. 2 Thereof at the Trial of said Case and During the Pendency Thereof.

BENJ. J. KLENE,
Judge of the Circuit Court of the City of St. Louis, State of Missouri, City of St. Louis, Presiding in Division No. 2 Thereof.

Approved:
MUENCH, WALTHER & MUENCH,
Attorneys for Plaintiff.
RODGERS & KOERNER,
Attorneys for Defendant.

150 *Index.*

153 And thereafter, and on the 5th day of January, 1921, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1920.

No. 21710.

ST. LOUIS MALLEABLE CASTING COMPANY, Appellant,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION CO., Respondent.

Come now the said parties, by their attorneys, and after argument herein, submit this cause to the court.

And thereafter, and on the 9th day of April, 1921, the following further proceedings were had and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1920.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corporation, Appellant,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, a Corporation, Respondent.

Appeal from the Circuit Court, City of St. Louis.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (Opinion filed.)

And on the same day, to-wit, the 9th day of April, 1921, there was filed in said cause the opinion of the Supreme Court of the State of Missouri, which said opinion is in the words and figures following, to-wit:

154 In the Supreme Court of the State of Missouri, Division No. 1, October Term, 1920.

No. 21710.

ST. LOUIS MALLEABLE CASTING CO., a Corporation, Appellant,

vs.

GEO. G. PRENDERGAST CONSTRUCTION CO., a Corporation, Respondent.

Statement.

The plaintiff brought this suit in the Circuit Court of the City of St. Louis against the defendant to cancel and set aside a certain tax-bill issued against the property of the former for the construction of Baden Sewer District No. 2, amounting to $9,168.86. The trial resulted in a judgment for the defendant and the plaintiff duly appealed the cause to this Court.

The petition charged substantially the following facts:

The petition of the plaintiff alleged that the Board of Aldermen of the City of St. Louis, upon the recommendation of the Board of Public Service of the City, adopted an ordinance, approved March 22, 1915, establishing a sewer district to be known as "Baden Sewer District No. Two", which ordinance is set out in full in the petition. That thereafter the Board of Aldermen enacted another ordinance prepared and recommended by the Board of Public Service for the construction of the sewer in said district, which ordinance was ap-

proved July 21, 1915, and under which the Board of Public Service was authorized and directed to let a contract for the construction work. The ordinance further provided for the acceptance by the City of St. Louis of sewers conveyed to the city by the St.
155 Louis Terminal Railway Company by deeds and that part of the sewers so conveyed should be incorporated in the system to be constructed under authority of the ordinance. The ordinance further provided that when the sewers were fully completed, the Board of Public Service should cause the entire cost and expense thereof to be computed and should levy and assess such cost and expense as a special tax, in accordance with the requirements of the Charter of the City, and cause to be issued a special tax bill against each lot or parcel of ground liable, in the manner provided by the charter. That the defendant was awarded the contract for the construction of the sewer, and that on December 22, 1916, the City of St. Louis issued and delivered to the defendant special tax bills for the aggregate amount of $65,744.67, being the entire cost for the construction of said sewer, as calculated by the Board of Public Service and as agreed upon in the contract between the city and the defendant, amongst which bills was one issued against the property of plaintiff for $9,168.86. That plaintiff is the owner in fee of the tract of land described in said tax bill, against which said tax bill was issued, which tract contains approximately 320,210 square feet. That the said assessment and charge in said tax bill is excessive, unlawful and void, for the reason that the said taxing district established by ordinance as aforesaid does not include large areas of land which were in the drainage area of said sewer and which properties stand in the same relative position as plaintiff's with respect to the said sewer and derive, and are so situated as to be capable of deriving, the same amount of benefit from said sewer as the property of plaintiff. That a large trace of land immediately north of plaintiff's property, hereinafter referred to as the "Kuhs" property and containing approximately the same area as plaintiff's property, and which property is so situated with respect to the said
156 sewer as to receive as great or greater benefit therefrom than the said property of plaintiff, was omitted from the said taxing district and exempted from taxation for any portion of the cost of the construction of said sewer. That a large tract of land fronting on the west side of Broadway and belonging to the Calvary Cemetery Association, and which property consists of a number of acres, and is in the natural drainage district of said sewer, which property is in the same relative position with respect to said sewer as the property of plaintiff, and derives as great benefit therefrom, was also omitted from said taxing district and exempted from the payment of any portion of the cost of said sewer. That by reason of the omission and exemption of the said large tracts of land from their just share of the said tax to pay the cost of construction of said sewer, an unreasonable and excessive proportion of the said tax has been assessed against the said property of plaintiff.

That the ordinances aforesaid, the provisions of the charter of the City of St. Louis purporting to authorize the Board of Aldermen

to establish a sewer district designating lands of private owners to be specially taxed to pay the entire cost of said sewer, violate the Fourteenth Article of the Amendments to the Constitution of the United States, in that they determine that said lands within the district prescribed by said ordinances would be benefited by said sewer and should be and were especially assessed therefor, as well as the apportionment of said taxes between the several lots or parcels of land and their respective owners within said district, without any hearing being accorded to the owners of said lands upon such determination, thereby denying plaintiff due process of law; that by the establishment of said sewer district and the imposition of said entire cost of the said district sewer upon the property therein, as ordained by the ordinance aforesaid, and by the exclusion of the land as aforesaid from the taxation of the cost of said sewer, although such
157 lands so excluded will be drained by said sewer and share equally with the property of plaintiff and other properties in said defined district in the benefits resulting from the construction of sewer, plaintiff has been denied due process of law, the equal protection of the law guaranteed to plaintiff by the said Fourteenth Article of the Amendments to the Constitution of the United States.

That the establishment of said sewer district and the levying of said tax by the ordinance aforesaid was and is arbitrary, unjust, oppressive and fraudulent, and by the said Board of Public Service known to be so at the time of its recommendation of said ordinance to said Board of Aldermen, and that the said Board of Public Service then knew that the aforesaid additional parcels of land would be drained by the said sewer and derive all of the benefits and advantages therefrom, which every other property within the said defined sewer district can or will derive therefrom and notwithstanding which the ordinances so recommended by the said Board of Public Service to said Board of Aldermen and by the latter enacted, imposed the whole cost of said sewer upon the lots within the said sewer district as defined by the said ordinance, and no part of said cost upon such additional lands. That the said Board of Public Service in recommending to the Board of Aldermen the said ordinance establishing the said district acted oppressively, arbitrarily and fraudulently in this: That prior to the establishment of the said sewer district, for the construction of said district sewer, plaintiff had, under permit of the then Board of Public Improvements of said city, the predecessor of said Board of Public Service, constructed a sewer system upon its said land, which private system was laid upon plaintiff's said property, along a private right-of-way, to a public sewer known as "Baden Public Sewer," with which sewer said private sewer of plain-
158 tiff was connected. That plaintiff had constructed the said sewer under permit as aforesaid at great cost and expense, and said sewer was adequate for taking care of the sewage and surface water from plaintiff's said land. That plaintiff's said property has no dwelling buildings upon it, the only buildings erected upon its said land being foundry, factory and office buildings occupied and used by it for the transaction of its business. That the tract of land hereinabove mentioned as the "Kuhs" property, and which has been

excluded from said taxing district as aforesaid, is and has been improved for a number of years by a large number of tenement and flat buildings occupied by more than forty families. That prior to the establishment of said taxing district for the construction of said district sewer, a short line of private sewer, for carrying off foul water, had been laid in said "Kuhs" property and was connected with plaintiff's private sewer above mentioned, and the sewage from said "Kuhs" property thus drained through said private sewer into said Baden Public Sewer. That in the planning of said district sewer it was provided for the laying of a line of said sewer along and upon a strip seven and one-half feet in width, being the western seven and one-half feet of said "Kuhs" property, extending southwardly from the south line of Christian Avenue, and it was further provided in said plan for the laying of a line of said district sewer upon and along a strip being the western ten feet in width of plaintiff's property hereinabove described and extending southwardly from the south line of Antelope Street to the north line of Thatcher Avenue, a distance of four hundred ninety-five feet, more or less. That the City of St. Louis obtained from the plaintiff, without any consideration moving to plaintiff therefor, a deed conveying the easement of right-of-way for said district sewer along and upon the said strip ten feet in
159 width. That said city also obtained a conveyance from the owners of the said "Kuhs" property, for the easement or right-of-way for said district sewer in said strip seven and one-half feet in width. That the deeds for the said sewer right-of-way recite a nominal consideration of one dollar. That notwithstanding the deed to the sewer right-of-way along said "Kuhs" property purported to be a conveyance in consideration of one dollar, the Sewer Commissioner of the City of St. Louis, who is also a member of the Board of Public Service, did, without authority and unlawfully, promise the owners of said "Kuhs" property that because of the making of said deed to said right-of-way the taxing district for the said Baden District Sewer No. 2 should be so laid out and said district so constructed that said "Kuhs" property, although receiving all of the benefits from said district sewer and being with respect to said sewer precisely in the same position as plaintiff's property, should be left out of said taxing district and exempted from the payment of any portion of the cost for the construction of said sewer. That the value of the sewer right-of-way upon said strip of the "Kuhs" property was trifling as compared with the proportion of the cost of said sewer properly and equitably taxable against said property. That the said Sewer Commissioner, in planning and laying out the taxing district for said district sewer, acted arbitrarily with a view of favoring the owners of the said "Kuhs" property and did so plan said district as to leave out of said taxing district all of the said "Kuhs" property except a strip being the western seven feet six inches in width and a strip fifty feet in width off the eastern part of said land, extending from the center line of Baden Public Sewer to the southern boundary line of said "Kuhs" property. That the said two strips of said "Kuhs" property were left in the taxing district for the fraudulent purpose of permitting the connection of said "Kuhs" property with said district sewer, owing to the fact that the said strips are immediately adjacent

to the pipes of said district sewer, thus making it possible for
160 the remainder of said "Kuhs" tract, eliminated from said taxing district as aforesaid, to obtain all the benefits and advantages of said district sewer. That the said Sewer Commissioner did report to the said Board of Public Improvements and to the committee of said board having under consideration the establishment of said district, his said unlawful arrangement with the owners of said "Kuhs" property, to so define said district as to eliminate substantially all of said "Kuhs" property, and did fully inform the other members of said board, and of the said committee of said board, that the said proposed elimination of said property from the taxing district was probably unlawful and might invalidate the tax bills issued for the construction of said sewer. That notwithstanding the said report of said Sewer Commissioner, and notwithstanding the members of said Board of Public Improvements did fully understand that the plan for said taxing district as submitted by the Sewer Commissioner was unjust, inequitable and invalid, the said Board of Public Improvements, as a committee of the whole, did arbitrarily, fraudulently and oppressively, and in a spirit of favoritism towards the owners of said "Kuhs" property, recommend the establishment of said taxing district with the elimination of substantially all of said "Kuhs" property as aforesaid and the said Board of Public Improvements did then, at the regular meeting of said board, adopt the recommendation of the committee of the whole of said board, and did prepare and recommend to the Board of Aldermen of the said City of St. Louis the ordinance establishing said taxing district, arbitrarily and fraudulently leaving out of the taxing district as defined in the ordinance so recommended to the Board of Aldermen, the said "Kuhs" property, with the exception of the two small strips hereinbefore specified. That the Board of Aldermen of said City of
161 St. Louis did, without any hearing being accorded the property owners in said proposed taxing district, and without any independent investigation of the facts, but acting solely upon the recommendation of said Board of Public Service as hereinbefore set forth, enact the said ordinances as aforesaid.

Similar allegations were made regarding another tract of land to-wit: the Calvary Cemetery Association, containing twenty-three acres, and similarly situated. The petition further charged that:

Plaintiff's property is improved by its office and foundry buildings and the Kuhs property is improved with a number of two-story brick flat and residence buildings, housing approximately 100 families.

In 1903 plaintiff obtained from Kuhs a deed for a sewer right-of-way along the eastern part of the Kuhs tract, extending from the northeast corner of plaintiff's property to Gingrass Creek. Plaintiff, at about the same time, under permit from the City of St. Louis, constructed a private twelve-inch sewer running from its property over the right-of-way acquired from Kuhs. This sewer emptied into Gingrass Creek. Subsequently, in 1907, under permit from the city plaintiff replaced the twelve-inch sewer by a twenty-four-inch sewer. This private sewer not only carried off the foul water, but also the surface water, from plaintiff's premises, and the evidence is undis-

puted that this private system of plaintiff was and would continue to be entirely adequate for the plaintiff's property.

The Kuhs property also has a private sewer system. Under permit from the city there was laid along the eastern part of the Kuhs property a fifteen-inch sewer paralleling the plaintiff's sewer. The records of the sewer department do not show that a permit was ever granted to Kuhs to lay any other private pipe.

162 Several years before the district sewer in question was built, a public or main sewer, known as Baden Public Sewer, was constructed in the bed of Gingrass Creek. The plaintiff's twenty-four-inch pipe and the fifteen-inch Kuhs pipe were both connected with the public sewer and both of these private sewers are still in use. Mr. E. L. Kuhs, for defendant, testified that there were two other pipes upon the Kuhs property, which also formerly emptied into Gingrass Creek, and are not connected with Baden Public Sewer, but the records of the Sewer Department do not show those connections.

Under the Charter of the City of St. Louis, Art. XXII, Sec. 3, before the Board of Public Service shall recommend an ordinance for the construction of a sewer to be paid by special assessments, the Board of Aldermen, on recommendation of the Board of Public Service, shall establish or shall have established a sewer district, or joint sewer district against the property in which it is proposed to assess benefits. The charter establishes an arbitrary rule for the assessment of all property within the district so established, according to area. The Board of Aldermen has no power under the charter to amend such an ordinance emanating from the Board of Public Service, but must either adopt the ordinance as recommended, or reject it. The charter makes no provision for notice to the property owners nor for a hearing before the Board of Public Service or the Board of Aldermen upon the question of benefits; that is, upon the question of what property shall be included within the benefit district, and there was not, according to the testimony, any such notice or hearing in the matter of the establishing of the taxing district for Baden District Sewer No. 2.

The matter of the establishment of this taxing district was pending before the Board of Public Improvements for a consid-

163 erable period of time before the bill defining the district was recommended by the board to the Board of Alderman. According to the testimony, the matter was up for consideration before the Board of Public Improvements, sitting as a Committee of the Whole, on November 18, 1913. According to the stenographer's transcript of the proceedings before the board on that date, Mr. J. L. Hornsby, as attorney for the Calvary Cemetery, appeared and presented a request that the property of the Cemetery Association be excluded from the taxing district and thus exempted from contributing anything to the cost of the sewer.

Mr. Hornsby stated to the board that Mr. Moreno, then Sewer Commissioner, had told him that twenty-three acres of the cemetery property sloped towards Broadway and that the surface water would necessarily drain into the proposed sewer; and that Mr. Moreno esti-

mated that the Cemetery Association's share of the cost of the proposed district sewer would be about $12,000.00. In the discussion before the board on that occasion, Mr. Moreno said: "I understand the attitude of Mr. Hornsby, and I think it is not unreasonable, at the same time we have to consider this, if we cut out that twenty-two acres and assess the entire cost of those sewers against this district that is populated, some of the property owners may contest the tax bills, as it is evident that the sewers do have to be made 20 per cent larger than they otherwise would have to be built to take care of that property outside of the district, and I am afraid we might not be able to get a contractor to bid on the work."

And again, in the course of the same discussion, in answer to a question of one of the other Commissioners as to whether there had ever been a case of exemption of that sort, Mr. Moreno replied: "I don't recall any since I have been here. We try to lay the
164 districts out so they will be on a basis perfectly fair to all the property owners within the district, and for that reason we could not very well exclude territory of this kind."

Mr. Kinsey, the president of the board, expressed a similar view. He said: "The statement of the Sewer Commissioner, in case your cemetery was exempt, that is to say, in such an event, if the district was laid out as to exclude the cemetery, the city would have to pay the portion ordinarily assessed against the cemetery, and in that way, in imposing upon the property owners in the district that additional burden, it makes it difficult to exclude this cemetery in the present case."

Mr. Moreno thereupon suggested: "The only thing I see we can do is to move the line over arbitrarily a portion of the distance, if the board thought that could be done. Still, that is establishing a precedent that might get us into trouble later." To which Mr. Talbert, another Commissioner, replied: "It seems to me you would have to follow the physical fact or lay yourselves open to future trouble."

The question of the elimination of the Kuhs property from the taxing district came before the board sitting as a committee of the whole, at a meeting held February 6, 1914. At this meeting Mr. Moreno, Sewer Commissioner, called attention to the fact that the Kuhs property had been left out of the plan for the district submitted by him. He stated in explanation that the property was not subdivided and was drained by two private sewers connecting with the public sewer. Then he continued: "Another thing, in order to properly drain the district, we are compelled to have a right-of-way from Kuhs' property in which to lay some of our sewers. He gave that right-of-way with the understanding that if we accepted
165 it and laid out the district that his property would be left out, on the ground that he had started it and it did not drain through any of the district sewers. If we decide to put his property in the district, we will have to give him back his right-of-way and enter condemnation proceedings to acquire it. In order that these people may have relief we have to go ahead with the district and include this property in Calvary Cemetery, regardless of their protests, and it is an open question as to whether or not we should leave this

other out or put it in. * * * It occurs to me that if we do leave this property out some of these other gentlemen who own vacant property might contest the tax bills."

On May 8, 1914, the question of the elimination of Calvary Cemetery and the Kuhs property again came up for consideration by the board. Mr. Hooke, who had succeeded Mr. Moreno as Sewer Commissioner, brought up the matter. He reported that something like twenty-three acres in Calvary Cemetery drained through the territory and that he had estimated that the cemetery should pay som-thing like $12,000.00 as its proportion of the cost of the sewer. He recommended that if the Cemetery Association could take care of its own drainage he thought it would be fair to leave them out of the district, and that then the size of the district sewer could be cut. He also estimated that the private drain which the Cemetery Association would have to construct would probably cost $4,500.00. As to the Kuhs property, being asked by Commissioner Wall as to what he had done regarding that, he answered, "Nothing, for two reasons; the first is he gave us all of those rights-of-way (I was sitting in there with the Sewer Commissioner myself) on condition that his sewers that were in there would be accepted, and if his sewers are accepted, there is no reason why we s-ould put him
166 in the district. * * * I do not see anything wrong with it, especially in view of the fact if we don't do that we must pass an ordinance and give him back those rights-of-way which were obtained under a misrepresentation."

The records of the board do not show that there was any further discussion of the matter by the board. The only subsequent record entry in connection with the establishment of the sewer district is the entry of November 17, 1914, in the proceedings of the board, that an ordinance establishing the taxing district was recommended to the Board of Aldermen.

Prior to the time when the question of the extent of the taxing district was brought by the Sewer Commissioner before the board sitting as a committee of the whole, the Sewer Commissioner had obtained a deed to a right-of-way seven and one-half feet wide and approximately 247 feet in length off the western side of the Kuhs property. The deed is dated May 9, 1913, and recites a nominal consideration of one dollar. This is the right-of-way deed referred to by the Sewer Commissioner in the discussion of the question of the exclusion of the Kuhs property from the sewer taxing district. The testimony shows that no money consideration moved from the city to the Kuhs Realty Company for this easement.

The plaintiff had also given the city a right-of-way for this district sewer, of a width of ten feet, and along the entire western line of its property, a distance of 495 feet. There was no actual consideration of whatever kind for this conveyance. The deed was made about the same time as the Kuhs deed.

The ordinance for the establishment of the district, as recommended by the Board of Public Service, was passed by the Board of Aldermen, the ordinance being approved by the Mayor on March 22, 1915. The district laid out by the ordinance does not include any

part of Calvary Cemetery and excludes all of the Kuhs property except a strip of seven and one-half feet in width off the entire
167 west line and a strip fifty feet in width off the east side extending from the southern boundary line of the Kuhs property to the public sewer, a distance of approximately 230 feet; 247.04 feet of the strip seven feet six inches wide embraces the sewer right-of-way deeded by the Kuhs Company to the city, but the remainder of the seven and one-half-foot strip included in the district, and having a length of approximately 215 feet, although not given for or used as a right-of-way for the district sewer, is yet included in the district.

According to the testimony of Mr. Doods, engineer and surveyor, a witness for the plaintiff, the area of Calvary Cemetery within the natural drainage district is twenty-three and a fraction acres and the area of the Kuhs property within the natural drainage area *area* and not included in the taxing district is 317,398 square feet. As shown by the plat of the taxing district, and as testified to by Mr. Osthaus, the Special Tax Assessor, the total area of the district as laid out is 2,296,039 square feet. Adding that to the area of the portion of Calvary Cemetery and the area of the Kuhs property, within the natural drainage district 3,634,919 square feet so that only 63.17 percent of the area of the natural drainage district has been included in the taxing district.

The size of the district sewer is greater than is necessary for the draining of the area taxed. This was testified to by Mr. Doods, witness for the plaintiff, who stated that the sewers in the district were larger than it is customary to build sewers for the draining of territory of the extent included in the taxing district and similarly situated with respect to the fall of the land. It is true that Mr. Horner, the City Engineer, testified that the sewers in the district were no larger than were reasona*lby* necessary for the needs of the territory included in the taxing district, but he admitted on cross-examination that in calculating the sizes of the sewers, the highest percentages of the various factors entering into the calcula-
168 tion were used. He further admitted upon cross-examination that the plans for the construction of the sewers, including the sizes of the pipes, had been prepared before the discussion as to the size of the taxing district by the Board of Public Improvements, and that no change in the sizes of the sewers in the district was made after the board determined to exclude Calvary Cemetery and the Kuhs property. In this connection we call attention to the statement of Mr. Moreno at the meeting of the board held on November 18, 1913: "It is evident that the sewers do have to be made 20 per cent larger than they otherwise would have to be built to take care of that property outside of the district." The plans, according to Mr. Horner, were not cha*gne*d after that meeting, and it is evident that the sewers, as constructed, are therefore 20 per cent larger tha*t* the requirements of the territory taxed called for.

Mr. Hornsby, attorney for the Calvary Cemetery, and who testified in behalf of defendant, stated that the cemetery property had been left out of the taxing district by the Board of Public Improve-

ments in consideration of the agreement of the Cemetery Association to construct a drain along the Broadway front of the cemetery property of sufficient size to take care of the surface water from that portion of the cemetery within the natural drainage area of the district, the private drain to be connected with Baden Public Sewer. The drain along Broadway, from Calvary avenue to the center gate of the cemetery, was to be an open concrete ditch, and from there northwardly an underground pipe. It was Mr. Hornsby's recollection that this arrangement between the Cemetery Association and the city officials was evidenced by letters.

Notwithstanding the contract between the Cemetery Association and the City, the Cemetery Association did not begin the construction of t-is private drain until October, 1916, at which
169 time the district sewer was practically completed, and did not finish the construction of the private sewer until March, 1917.

Mr. Horner, City Engineer, who testified in behalf of defendant, stated that the chief consideration for the leaving out of the Kuhs property was the fact that it had a private system which, with proper inlets, would be sufficient to take care of both the foul and surfact water of the Kuhs land. The testimony of Mr. Hooke, Sewer Commissioner, was to the same effect. Mr. Horner admitted that the inlets which the Sewer Commissioner directed should be made for the purpose of taking care of the surface water of the Kuhs property, as a condition to the accepting of the private system as a part of the sewer system of the city, have not yet been made. Mr. Kuhs, also a witness for the defendant, likewise admitted that fact, but stated that he was making preparations for having the inlets constructed. Both Mr. Moreno and Mr. Hooke stated that they had no independent recollection of the negotiations with Mr. Kuhs and therefore could neither confirm nor deny the correctness of their representations to the Board of Public Improvements at the meetings held on February 6th and May 8th, 1914, that the deed for the right-of-way for the district sewer from the Kuhs Realty Company had been given on condition that the Kuhs property would not be included in the taxing district and that if the Kuhs property were included in the taxing district, the right-of-way deed would have to be returned and condemnation proceedings instituted.

None of the members of the Board of Public Improvements who testified, nor Mr. Horner, the chief engineer, could give any satisfactory explanation of why the Kuhs property was left out of the taxing district while the property of the plaintiff, which admittedly had an adequate private system, which is still draining directly into the Baden public sewer, was included. It was suggested by
one of these witnesses for defendant that there was some
170 difference between the two parcels of land, in that the Kuhs property immediately adjoined the public sewer, but when it was pointed out to this witness that the plaintiff had a right-of-way extending from its property to the public sewer, which right-of-way had been deeded to it by Kuhs, and that therefore plaintiff's property, to that extent, also abutted upon the public sewer, it was ad-

mitted that this was no substantial ground for differentiating between the two properties in the matter of the taxation for the building of the district sewer. In this connection we call the Court's attention to the fact that the plaintiff's private sewer system, built under permits from the city, cost, according to the evidence, in excess of $4,500.

The Court took the case under advisement and on December 30, 1918, at the December Term, 1918, entered a finding and judgment for defendant and dismissed plaintiff's bill.

The defendant's evidence tended to show:

The sewer, for proportionate part of cost of which appellant's ground was assessed, had been fully completed when this suit was brought and appellant had connected its said premises with this sewer and was in actual enjoyment of the benefits thereof. The evidence fails to show any act of commission or omission on the part of the contractor. The appellant does not question the utility of the sewer. Yet, without offering to pay any part of its cost, appellant comes into a court of equity and asks that the entire assessment against its property be canceled.

The charter of the City of St. Louis required the establishment by ordinance, on recommendation of the Board of Public Service, of a taxing district preliminary to the adoption of an ordinance providing for construction of sewers within the district, and also required a public hearing, on notice, as a condition precedent to such
171 recommendation. Prior to tentatively laying out this sewer district, members of the Board of Public Service visited the locality in person and went over the ground. In addition to this this Board had before it information of the local conditions gathered by its assistants, and, as one of the members expressed it in his testimony, was mindful of its duty to include in the assessment district all the property that would be benefited by the sewer.

The testimony shows that two tracts of ground within the same natural basin in which this district sewer was laid, were omitted from this sewer district.

One of these tracts, about 23 acres, is a portion of Calvary Cemetery. A representative of the Cemetery Association appeared before the Board of Public Improvements, then existing under the old charter of the City of St. Louis, and being the predecessor of the Board of Public Service, at a discussion of the then proposed sewer and taxing district therefor, and suggested that since the cemetery had no foul water to drain, it might with propriety be left out of the district. At this meeting some talk was had about the cemetery constructing open drains that would carry the storm water from its ground into a near-by public sewer. The cemetery property was omitted from the sewer district; and afterwards the said proposed open drains were constructed by the Cemetery Association entirely at its own expense, with the result that nothing from the cemetery enters the district sewer.

The other of said two tracts omitted from the district was a portion of the "Kuhs" property, as it is called th-oughout the case, improved with dwelling houses accommodating about 100 families, and

all of which was perfectly drained by a private sewer emptying into an adjoining public sewer.

Appellant's ground, all within the present sewer district and less in area than either of the portions of the cemetery or "Kuhs" tracts omitted from the district, was at the time of fixing
172 the sewer district occupied as a manufacturing plant, consisting of foundry, warehouse and office buildings. It had a private sewer system connecting with the public sewer some distance away from it; but appellant was one of the petitioners for this district sewer, and as soon as possible connected its plant with it for purposes of additional drainage.

The Cemetery Association, Kuhs, and appellant all had at times prior to the fixing of the present sewer district given the city rights-of-way for sewer purposes.

The members of the Board of Public Service, which recommended the present district, testifying in this case, all denied any bargain whereby portions of the cemetery or Kuhs properties were to be, or were, omitted from this taxing district. And the following facts were also established by such testimony, viz.:

In the judgment of the Board of Public Service, the portions of the cemetery and Kuhs properties omitted from such district were both adequately drained at private expense into the public sewer and were not benefitted by the district sewer; and appellant's property was not adequately drained by its private sewer system connected with the public sewer and was benefitted by the district sewer, which it immediately made use of.

That the dimensions of district sewer were not originally designed to drain any portion of the cemetery or Kuhs properties, and that the district sewer as designed and laid was exactly adapted to the present district according to the best expert opinion on the subject.

After the evidence was all in and the cause was under advisement, the defendant (respondent here) petitioned the Court for leave to amend its answer. The answer, as it stood, was a general denial, and defendant sought to amend by adding thereto a plea of estoppel based on allegations to conform to the evidence to the effect
173 that the plaintiff (appellant here), prior to the letting of the contract, knew that the City of St. Louis was about to let a contract for construction of the sewer in question and was familiar with the beginning and progress of the work of constructing said sewer, and knew that its (appellant's) said ground would be thereby benefited and assessed therefor, and knew the extent of such assessment, and applied for permission to, and did, connect its premises therewith, but gave no notice that it would contest payment of its special tax bill, and silently stood by and permitted the work to be done and received the benefits thereof; and that plaintiff, by petitioning for said sewer, encouraged the city to form said sewer district and caused sewers to be constructed therein.

The trial court found in favor of defendant, without ruling on its said petition for leave to amend its answer.

Opinion.

I.

The plaintiff makes a very plausible case by the allegations of its petition, but it is not supported by either the evidence in the case or the finding of the trial court.

The tax bill sued on was prima facie evidence of its validity; and the testimony in the case was ample to support its validity, and not tending to overturn it.

II.

It is insisted that the establishment of the taxing sewer district is a nullity because no notice was given of that fact to the property owners.

No such notice was necessary, as decided by this Court and
174 the Supreme Court of the United States. Speaking upon that point this Court in the case of Meier vs. City of St. Louis, 180 Mo. 391 l. c. 409, used this language:

"As to the contention that the special assessments amount to a taking of plaintiff's property without due process of law, it may be said that no notice is required by the Constitution to be given property-owners respecting those matters which the Legislature itself determines, or delegates to be the municipal authorities. (Spencer v. Merchant, 125 U. S. 345; Williams v. Eggleston, 170 U. S. 304; St. Louis v. Rankin, 96 Mo. 497.) Publication of notice to the property-owners, and opportunity to be heard before the tribunal upon which is devolved the duty of ascertaining facts and acting therein in the special assessment procedure, satisfies the constitutional requirement, and is due process of law as to those matters to be passed upon by such tribunal.

"We think section 14 of article 6 of the amended charter of St. Louis complies with this requirement.

"When the taxing district has been fixed by valid legislation and when the apportionment of the cost of the improvement upon the property in the district has been so fixed, the owner of the property in the district can not be heard to contend in the court that his property was not in fact benefited, or to the amount assessed in accordance with such apportionment. (Prior v. Construction Co., 170 Mo. 439.)

"The charter of St. Louis adopted by a vote of its people in obedience to an express grant by the Constitution of the State, has, with respect to municipal matters, including special assessments for local improvements, all the force and effect of an act of the Legislature. (City of St. Louis v. Fischer, 167 Mo. 654; Pryor v. Construction Co. 170 Mo. 439; St. Louis v. Gleason, 15 Mo. App. 25; Ibid v. Ibid, 93 Mo. 33; Kansas City v. Oil Co., 140 Mo. 468.)"

175 To the same effect are the following cases:
"Heman v. Allen 156 Mo. 534 l. c. 551;
Heman v. Schulte 166 Mo. 409 l. c. 417;
Embree v. K. C. Road District, 240 U. S. 242 l. c. 250."

Moreover the interested parties were given due notice of the meeting of the Board of Public Service where all were given full opportunity to be hard as to, and complain of, any matter which might make it inequitable to construct the sewer as projected in the district established.

III.

This Court has repeatedly held that the action of the Municipal authorities in the establishment of a sewer district in the absence of fraud, is conclusive and not subject to review by the Courts.
"Heman v. Allen 156 Mo. 534;
McGhee v. Walsh 249 Mo. 266."

IV.

This record contains no evidence whatever of fraud, much less any evidence connecting the contractor with fraud. A complaint of fraud comes too late after the work is completed.
"Jennings Heights Land & Imp. Co. v. City of St. Louis et al., 257 Mo. 291;
Bank v. Woesten 147 Mo. 467."

And we have also held that the Municipal authorities of the City of St. Louis are the sole judges of the dimensions of contemplated sewers.
"Heman v. Allen 156 Mo. 534."

176 V.

Silent acquiescence with knowledge of the improvement, especially when accompanied by acceptance of its benefits, estops the property owner from denying validity of the tax bill.
"Paving Co. v. Flemming, 251 Mo. 210;
Heman v. Ring, 85 Mo. App. 231;
Walsh v. Bank, 139 Mo. App. 641;
Smith v. Carlow, 114 Mich. 67;
Fitahugh v. City of Bay City, 109 Mich. 581;
Atkinson v. Newton, 169 Mass. 240;
Board of Commissioners v. Plotner, 149 Ind. 116;
Patterson et al. v. Baumer, 43 Iowa, 477;
Wright v. Davidson, 181 U. S. 371 l. c. 377."
Gibson v. Owens, 115 Mo. 258.

Counsel present other questions for determination, but those we have decided fully dispose of the case, and therefore it is not necessary to notice the remaining points made.

Finding no error in the record, the judgment is affirmed.

All concur.

A. M. WOODSON,
P. J.

177 And thereafter, and on the 18th day of April, 1921, there was filed in said cause the Appellant's Motion for Rehearing, which said motion for rehearing is in the words and figures following, to wit:

In the Supreme Court of Missouri, Division No. 1, April Term, 1921.

No. 21710.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corporation (Plaintiff), Appellant,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, a Corporation (Defendant), Respondent.

Appellant's Motion for Rehearing.

Comes now the appellant in the above-entitled cause and moves the Court to grant it a rehearing, and as grounds for said motion states:

I.

That a question decisive of the case and duly submitted by counsel has been overlooked by the Court. That the said question
178 related to the nature of the action of the Board of Aldermen of the City of St. Louis in passing the ordinance establishing the taxing district in question; that the Board of Aldermen, in passing the said ordinance, was not acting legislatively, and therefore the property owners were entitled to notice and hearing upon the question of the benefits assessed by the ordinance.

II.

That another question decisive of the case and duly submitted by counsel has been overlooked by the Court. That question related to the invalidity of the taxing ordinance, due to the fact that property similarly situated as plaintiff's with relation to the sewer, was exempted from taxation in consideration of an unlawful agreement between the city officials and the owners of the property, the consideration for the exemption being the granting of a right of way for the district sewer by one of the exempted owners and an agreement for the construction of a private drain by the other exempted

owner. The opinion on pages 11 and 12 sets forth the statement of the Sewer Commission that the right of way had been given by one of the owners, Kuhs, on condition that his property would be left out of the taxing district. The Court, also, in the opinion, sets forth that the leaving out of the other property "Calvary Cemetery" was the result of an agreement whereby the Calvary Cemetery Association contracted to build a private drain. The Court, in the opinion, makes no reference whatever to this question, nor to the controlling cases in this state to the effect that such an agree-
179 ment is void and invalidates the taxing district which is based upon the agreement.

City of St. Louis v. Meier, 77 Mo. 13;
Bank v. Clark, 250 Mo. 20, and other cases cited under Point IV of Appellant's Brief.

III.

That another question decisive of the case and duly submitted by counsel has been overlooked by the Court. That said question is that the provisions of the Charter of the City of St. Louis relating to the establishment of taxing districts for district sewers and the provisions of the ordinances under which the tax bill in suit was issued, are violative of the due process clause of the Federal Constitution.

IV.

That another, question, decisive of the case and duly submitted by counsel, has been overlooked by the Court, viz: That the taxing district in question was, in fact, established by the Board of Public Service of the City of St. Louis, an administrative body, the Board of Alderman, being by the provisions of the Charter of the City of St. Louis limited to passing or rejecting the taxing ordinance as recommended by the Board of Public Service and being without power to amend such ordinance so recommended or to initiate a tax district defining ordinance.

That the Court overlooked the question decisive of the case, that the ordinance establishing the taxing district was arbitrary and confiscatory and violative of the provisions of the Constitution
180 of the United States and of the State of Missouri providing for due process and the equal protection of the laws.

V.

That the Court bases its conclusions in part upon the doctrine of estoppel, overlooking the fact that estoppel had not been pleaded by defendant. (See paragraph V of the Opinion.)

VI.

That the Court, in holding in paragraph II of the opinion, that the interested parties were given due notice of the meeting of the

Board of Public Service in the City of St. Louis, where all were given full opportunity to be heard as to, and complain of, any matter which might make it inequitable to construct the sewer as projected in the district established, overlooked the fact that this Court in the case of Collier Estate v. Western Paving and Supply Company, 180 Mo. 363 (l. c. 390), held that the charter provisions in question which provide for a hearing (after the taxing district has been established) upon the proposed improvement and the kind of material and manner of construction, afford no hearing upon the question of benefits.

VII.

That the Court overlooked the fact that the taxing district in question was established by ordinance and not by the provisions of the Charter of the City of St. Louis as was the fact in the case of Meier v. the City of St. Louis, 180 Mo. 391, cited by the Court in support of the holding that no notice of the establishment of
181 the taxing district was necessary. In the Meier v. St. Louis case the taxing district was established by the charter itself, the provisions of the charter acting automatically when a street improvement was ordered. The charter being on a par with an Act of the State Legislature, the Court held it was not necessary to due process that notice be given of such legislative act. In the case at bar the charter does not establish the taxing district, but that is done by ordinance recommended by the Board of Public Service, which lays out the district, and passed by the Board of Aldermen.

VIII.

That the Court, in the opinion, sets out under paragraphs 8 to 17 (both inclusive) statements of fact, apparently intended to be stated as findings by this Court, which fully and conclusively support the allegations of plaintiff's petition of fraud in the enactment of the ordinance and establishment of the taxing district complained of, and yet the Court, in the opinion, while stating that "the plaintiff makes a very plausible case by the allegations of its petition," holds that the allegations are not supported by the evidence, and that the record contains no evidence whatever of fraud.

IX.

That the Court, in holding that plaintiff was estopped from denying the validity of the tax bill in suit, overlooked the fact that the question of estoppel was not in the case, never having been pleaded, and overlooked a controlling decision of this Court, being the case of Perkinson v. Houlihan, 182 Mo. 189 (l. c. 193).

182 *Brief in Support of Motion for Rehearing.*

Plaintiff's petition charges that the Board of Public Service of the City of St. Louis in recommending to the Board of Aldermen

the ordinance establishing the taxing district, acted arbitrarily, fraudulently and oppressively, and in a spirit of favoritism towards owners of property whose lands derived the same benefit from the sewer as plaintiff's by eliminating the properties of such owners from the taxing district. In support of this charge, appellant introduced in evidence transcripts of the proceedings of the Board of Public Service giving the statements of several Commissioners which fully and conclusively established these allegations of the petition. In the statement of facts in appellant's brief all of these matters alleged in the petition are shown to have been established by the evidence. The Court, in the statement of the facts, preceding the opinion herein, adopts word for word the appellant's version of the effect of this evidence (compare pages 8 to 17, both inclusive, of the opinion with pages 14 to 25, both inclusive, of appellant's statement).

This statement of facts by this Court in the opinion herein shows conclusively that the Board of Public Service acted arbitrarily and unreasonably at the time it laid out the taxing district, that its action was unlawful (see statements, pages 10 to 13, both inclusive, of opinion).

This evidence, the effect of which, as claimed by appellant, is adopted by this Court in its opinion, follows the allegations of the petition with respect to the charge of fraud, that charge
183 having been pleaded with much particularity. The Court, in the opinion, follows that statement with a statement that the defendant's evidence tended to show certain things, and this part of the Court's opinion is a copy of the entire statement contained in respondent's printed statement.

Notwithstanding the Court thus states that the record contains evidence of fraud, it is held in the opinion, under Point I, that while plaintiff makes a very plausible case by the allegations of its petition, it is not supported by the evidence, and, under Point IV of the opinion, that the record contains no evidence whatever of fraud.

The opinion contains no discussion whatever of the weight and effect of the evidence, but makes simply the bold statement that there is no evidence of fraud.

II.

The Court seems to have overlooked the question raised by Point IV of appellant's brief that the agreement to exempt the "Kuhs" property, in consideration of the granting of the right of way for the district sewer and the altering of the Kuhs private sewer system was invalid and rendered the taxing district, based upon such agreement, void. On page 11 of the Court's statement of the facts, the statement by the Sewer Commissioner at a meeting of the board, when the establishment of the taxing district was under consideration, is quoted, to the effect that Kuhs had given the city a right of way "with the understanding that if we accepted it and laid out the district that his property would be left out." There are other
184 statements in the evidence, as given in the opinion, which are to the same effect, and show conclusively that the elimination

of the Kuhs property from the taxing district was the result of an unlawful bargain between the city and the property owner thus favored. It is elementary that a municipality cannot thus bargain away its taxing power and that such an arrangement as was proven in this case is unlawful. A tax built upon such a foundation must fall.

The case of City of St. Louis v. Meier, 77 Mo. 13, is directly in point, and since the effect of the decision in the case at bar will be to overrule that case, long recognized as an authority upon this question and repeatedly followed by this Court in later decisions, we earnestly press the point upon the Court's attention. Although the question is in itself decisive of the case, it was evidently entirely overlooked by this Court, for in no other way is the failure of the Court in its opinion to make any mention of the point to be reasonably explained.

III.

The taxing district was laid out by ordinance and was not established by the charter of the City of St. Louis. The procedure in such matters under the city's charter is, that the Board of Public Service, an administrative body, makes the inquiry into and finds the facts as to the extent of the benefit of the improvement. This board then prepares and submits with its endorsement an ordinance to the Board of Aldermen. That body has no free legislative power in the premises. It cannot initiate such an ordinance; neither
185 can it in any way modify an ordinance submitted by the Service Board. It must either pass or reject the bill drafted and recommended by the Service Board.

The Court, in its opinion, paragraph II, in holding that notice to the property owners of the establishment of the taxing district is not necessary, seems to have been laboring under a misapprehension that the charter itself fixed the limits of a sewer taxing district, for the Court cites only one case in support of its holding, viz., Meier v. City of St. Louis, 180 Mo. 391, from which it quotes the following:

"The charter of St. Louis * * * has * * * all the force and effect of an act of the legislature."

The taxing district under consideration in that case was established by the charter. The municipal legislative body had nothing to do with it. When a street was ordered improved, the charter acted automatically. The charter being on a par with a direct act of the legislature, notice was not essential to due process; and that is all that this Court held in the Meier case.

But that decision does not touch the point in this case, and the Court entirely overlooked or ignored the vital point which we made in our brief that when a tax assessment is made by a local administrative body (and it is in such capacity that the boards of public service and aldermen acted) notice to the property owners and an opportunity to be heard are necessary. The Board of Aldermen

when it functions in these matters is acting in the same ca-
186 pacity as the County Court in the making of improvements and taxation therefor. And the determination by such a board is no such legislative decision as will dispense with notice. Embree v. Road Dist., 240 U. S. 247.

IV.

At the conclusion of paragraph II of the opinion the Court says:

"Moreover, the interested parties were given due notice of the meeting of the Board of Public Service, where all were given full opportunity to be heard as to, and complain of, any matter which might make it inequitable to construct the sewer as projected in the district established" (p. 22 of opinion).

There is no evidence in the record of any such notice.

What we surmise the Court has reference to is a provision of the Charter for a hearing after the taxing district has been established, on the character of the sewer, the materials of which it is to be constructed, etc. If so, the Court overlooked the fact, to which we called attention in our brief, that this Court held in the case of Collier Est. v. Paving & Supply Co., 180 Mo. 363, that this provision of the Charter afforded no opportunity to protest against the proposed taxing district.

V.

The Court under Point IV of the opinion seems to hold that in order to escape from the consequences of fraud upon the part
187 of the officers of the city in laying out the taxing district, it is necessary to connect the contractor with the fraud. When it is remembered that the ordinance for letting the contract cannot be passed until after the taxing district has been finally established, and that the contract is let to the lowest bidder only after the improvement ordinance has gone into effect, it becomes evident that the man who might ultimately be awarded the contract would have no interest in the matter at the time of the establishment of the taxing district, and would not be likely to be a party to any fraud in the determining of the benefits. The only persons who would be parties to the fraud in the levying of the tax would be the city and the property owner who was being favored. The decision of the taxing board as to benefits, if fraudulent, is a nullity and cannot be made valid by reason of the fact that someone not a party to the fraud may later make a contract with the city for the improvement to be paid for by the tax. If Jennings Heights L. & I. Co. v. St. Louis et al., 257 Mo. 291, cited by the Court in support of this novel proposition so holds, then it is in conflict with all the well-reasoned cases in this and other jurisdictions.

VI.

The last paragraph of the opinion is an exact copy of Point VI of the brief of respondent and is to the effect that silent acquiescence, with knowledge of the improvement, especially when accompanied by acceptance of its benefits, estops the owner from denying the validity of the tax bill.

188 The Court overlooks the fact that the answer below was a general denial without any plea of estoppel. Furthermore, there was no evidence of "silent acquiescence with knowledge of the improvement." But even if estoppel had been pleaded and there were evidence to support the plea, the tax bill, if void, as we claim, could not be made valid by silent acquiescence or even active approval. This is the well established rule. So, for illustration, in the case of Perkinson v. Hoolan, 182 Mo. 189, this Court held that, even though defendant had petitioned for the improvement and stood by without protest while the work was being done, he was not thereby estopped from showing that the tax bills were void.

For the reasons aforesaid, we respectfully submit that the motion for rehearing should be sustained.

By WALTHER, MUENCH & HECKER,
Attorneys for Appellant.

189 And on the same day, i. e., the 18th day of April, 1921, there was filed in said cause the Appellant's Motion to Transfer Case to Court in Banc, which said motion is in the words and figures following, to-wit:

In the Supreme Court of Missouri, Division No. 1, April Term, 1921.

No. 21710.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corportion (Plaintiff), Appellant,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, a Corporation (Defendant), Respondent.

Appellant's Motion to Transfer Case to Court in Banc.

Comes now the appellant in the above-entitled cause, and moves the Court to transfer the case to the court in banc for its decision, and as ground for said motion states that a federal question is involved in the case.

And in support of its motion appellant shows to the Court that in its petition it alleged that the ordinances of the City of St. Louis referred to and set out in the said petition, and the provisions of

190 the Charter of the City of St. Louis purporting to authorize the Board of Aldermen to establish a sewer district designating lands of private owners to be specially taxed to pay the entire

cost of the sewer mentioned in the petition, violate the Fourteenth Article of the Amendments of the Constitution of he United States in that they determined that the lands within the district prescribed by said ordinances would be benefited by the sewer and should be and were specifically assessed therefor, as well as the apportionment of the tax as between the several lots or parcels of land and their respective owners within said district, without any hearing being accorded the owners of said land upon such determination, thereby denying plaintiff due process of law (App. Abs., pp. 12-13).

That it is further alleged in plaintiff's petition that by the establishment of the sewer district described in the petition and the imposition of the entire cost of the district sewer mentioned in the petition upon the property in said district as ordered by the ordinance mentioned and set forth in plaintiff's petition, and by the exclusion of the lands mentioned in the petition from taxation for the cost of the said sewer, although such lands so excluded are drained by the said sewer and share equally with the property of plaintiff and other properties in the said defined district in the benefits resulting from the construction of the sewer, plaintiff has been denied due process of law and the equal protection of the laws granted to plaintiff by the said Fourteenth Article of the Amendments to the Constitution of the United States (App. Abs., p. 13).

191 That it is further alleged in plaintiff's petition that the special tax bill sought to be canceled is unlawful and void for the further reason that the Charter of the City of St. Louis prescribes a rule for the establishment of the district in which the cost of construction of a district sewer is to be assessed, without regard to any consideration of the difference in benefits conferred upon the real estate coming within such arbitrarily defined district. That the said provisions of the Charter of the City of St. Louis are arbitrary and unreasonable and result in the distribution of such tax in grossly unequal proportions, and that the said tax was under the said Charter provisions and the ordinance enacted in pursuance thereto mechanically apportioned, as fully set out in the petition, by assessing the whole cost of said sewer as a special tax against all of the lots or parcels of ground in said sewer district in the ratio that each parcel and lot of ground bears to the area of the whole district, exclusive of the area of streets, avenues, public highways and alleys, without any consideration of the benefits, if any, conferred upon the lands so taxed. That the said Charter provisions and the said ordinance are violative of the Fourteenth Amendment of the Constitution of the United States in that they deny to plaintiff the equal protection of the laws and constitute a taking of plaintiff's property without due process of law and without adequate compensation (App. Abs., p. 20).

That it is further alleged in plaintiff's petition that the special tax bill sought to be canceled is unlawful and void in that the as-

192 sessment and levy of said taxes on plaintiff's property amounts to confiscation thereof for public use and constitutes the taking of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and

in violation of Sections 20 and 30 and Article II of the Constitution of the State of Missouri (App. Abs., pp. 20-21).

Appellant further shows to the Court, that in its motion for rehearing in the Circuit Court, appellant set up among others the following grounds for rehearing:

"Because the said tax is unlawful and void for the reason that the Charter of the City of St. Louis under authority of which said tax bill was issued, prescribes a rule for the establishment of the taxing district for private sewers without regard to any consideration of the difference in benefits conferred upon the real estate coming within such arbitrarily defined district. That the said provisions of the Charter of the City of St. Louis are arbitrary and unreasonable and result in the distribution of such tax in grossly unequal proportion that said charter provisions, and the ordinance enacted in pursuance thereto, by authority of which the tax bill described in the petition was issued, are violative of the Fourteenth Amendment to the Constitution of the United States, in that they deny to plaintiff the equal protection of the laws and constitute a taking of plaintiff's property without due process of law and without adequate compensation.

"Because said special tax bill is unlawful and void and the assessment and levy of said tax upon plaintiff's property amounts
193 to confiscation thereof for public use, constitutes the taking of property without due process of law, violates the Fourteenth Amendment of the Constitution of the United States and violates Sections 20 and 30 of Article II of the Constitution of the State of Missouri.

"That the ordinance establishing the taxing district, upon which the special tax bill described in the petition is based, is invalid because no notice or opportunity to be heard upon the establishment of said taxing district was given plaintiff, in violation of the provisions for due process of law of the Constitution of the United States and of the State of Missouri" (App. Abs., pp. 23 and 24).

Appellant further shows to the Court that in the appellant's assignment of errors in this court the following, among other, errors are assigned:

"Fourth. That said tax bill is unlawful and void because the Charter of St. Louis, under authority of which it was issued, prescribes a rule for the establishment of taxing districts for district sewers without regard to any consideration of the difference in benefit conferred upon the real estate coming within such arbitrarily defined district. That said provisions of said charter are arbitrary and unreasonable and result in distributing such tax in grossly unequal proportions. That said charter provisions and the ordinance enacted in pursuance thereto and by authority of which the tax bill in suit was issued, are violative of the Fourteenth Amendment to the Constitution of the United States in that they deny to plaintiff the equal protection of the laws and constitute a taking of plaintiff's property without due process of law and without adequate compensation. That for
194 these reasons the Circuit Court should have declared said tax bill void.

"Fifth. That said tax upon plaintiff's property amounts to confiscation thereof for public use, constitutes taking of property without due process of law, violates the Fourteenth Amendment to the Constitution of the United States and violates Sections 20 and 30 of Article II of the Constitution of Missouri, and the Court erred in not so holding.

"Sixth. That the ordinance establishing the taxing district is invalid because no notice or opportunity to be heard upon the establishment of said taxing district was given plaintiff, in violation of the provisions for due process of law of the Constitutions of the United States and of the State of Missouri, and it was error of the Circuit Court in not so holding."

Wherefore, appellant prays the Court to transfer the case to the Court in banc for its decision, in compliance with the provisions of Section IV of the Amendment of 1890, to Article VI of the Constitution of the State of Missouri.

By WALTHER, MUENCH & HECKER,
Attorneys for Appellant.

195 And thereafter, and on the 6th day of June, 1921, the following further proceedings were had and entered of record in said cause, to wit:

In the Supreme Court of Missouri, Division No. 1, April Term, 1921.

No. 21710.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corporation, Appellant,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, a Corporation, Respondent.

Now at this day, the Court having considered and fully understood the motion heretofore filed by the said appellant for a rehearing herein, as also its motion, heretofore filed, to transfer this cause to the Court in Banc, doth order that said motions, and each of them, be, and the same are hereby overruled.

196 In the Supreme Court of Missouri.

No. 21710.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corporation (Plaintiff), Appellant,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, a Corporation (Defendant), Respondent.

Appellant's Petition for Writ of Error to the Supreme Court of the United States.

To the Honorable James T. Blair, Chief Justice of the Supreme Court of the State of Missouri:

The petition of St. Louis Malleable Casting Company, a corporation organized and existing under the Laws of the State of Missouri, respectfully shows:

I. That heretofore to-wit on the 19th day of May, 1917, an action was instituted in the Circuit Court of the City of St. Louis, Missouri by your petitioner as plaintiff against The George G. Prendergast Construction Company, a corporation, as defendant, seeking the cancellation of a special tax bill in the sum of $9,168.86 issued against the property of your petitioner for the construction of Baden District Sewer No. 2 of the City of St. Louis, Missouri, the total cost of which was $65,744.67.

II. That plaintiff's amended amended petition alleged in part that the Board of Aldermen of the City of St. Louis, upon the recommendation of the Board of Public Service of the City, adopted an ordinance, approved March 22, 1915, establishing a sewer district to be known as "Baden Sewer District No. Two", which ordinance is set out in full in the petition. That thereafter the Board of Aldermen enacted another ordinance, prepared and recommended by the Board of Public Service for the construction of the sewer
197 in said district, which ordinance was approved July 21, 1915, and under which the Board of Public Service was authorized and directed to let a contract for the construction work. The ordinance further provided for the acceptance by the City of St. Louis of sewers conveyed to the City by the St. Louis Terminal Railway Company by deeds and that part of the sewers so conveyed should be incorporated in the system to be constructed under authority of the ordinance. The ordinance further provided that when the sewers were fully completed, the Board of Public Service should cause the entire cost and expense thereof to be computed and should levy and assess such cost and expense as a special tax, in accordance with the requirements of the Charter of the City of St. Louis, and cause to be issued a special tax bill against each lot

or parcel of ground liable, in the manner provided by the charter. That the defendant was awarded the contract for the construction of the sewer, and that on December 22, 1916, the City of St. Louis issued and delivered to the defendant special tax bills for the aggregate amount of $65,744.67, being the entire cost for the construction of said sewer, as calculated by the Board of Public Service and as agreed upon in the contract between the city and the defendant, amongst which bills was one issued against the property of plaintiff for $9,168.86. That plaintiff is the owner in fee of the tract of land described in said tax bill, against which said tax bill was issued, which tract contains approximately 320,210 square feet.

The petition alleged in part that the assessment of said tax bill was excessive, unlawful and void for the reason that the taxing district did not include large areas of land which were in the drainage area of the Sewer and which properties stand in the same relative position as plaintiff's land with respect to the sewer and that large tracts of land referred to as the "Kuhs Property" and that of the Calvary Cemetery Association were omitted from the district and exempted from taxation for the cost of said sewer with the result that an unreasonable and excessive proportion of the tax was assessed against your petitioner.

198 That the ordinances aforesaid and the provisions of the Charter of the City of St. Louis purporting to authorize the Board of Aldermen to establish a sewer district designating lands of private owners to be specially taxed to pay the entire cost of said sewer, violate the Fourteenth Article of the Amendments to the Constitution of the United States, in that they determine that said lands within the district prescribed by said ordinances would be benefited by said sewer and should be and were especially assessed therefor, as well as the apportionment of said taxes between the several lots or parcels of land and their respective owners within said district, without any hearing being accorded to the owners of said lands upon such determination, thereby denying plaintiff due process of law; that by the establishment of said sewer district and the imposition of said entire cost of the said sewer upon the property therein, as ordained by the ordinance aforesaid, and by the exclusion of the land as aforesaid from the taxation for the cost of said sewer, although such lands so excluded will be drained by said sewer and share equally with the property of plaintiff and other properties in said defined district in the benefits resulting from the construction of said sewer, plaintiff has been denied due process of law, and the equal protection of the law guaranteed to plaintiff by the said Fourteenth Article of the Amendments to the Constitution of the United States.

The petition further alleged that the establishment of said sewer district was arbitrary, unjust, oppressive and fraudulent, in that the Board of Public Service & Board of Aldermen of the City of St. Louis knew that the additional tracts of land aforesaid would be drained by the sewer as established and that the Board of Public Service acted fraudulently in recommending the ordinance establishing the district for the reason that your petitioner, the plaintiff,

had previously constructed a private sewer at great expense which was laid across its land to a public sewer known as the Baden Public Sewer, which private sewer was laid under a permit from the said Board of Public Improvements of the City of St. Louis and which also drained the property exempted from the district and that the owner of said Kuhs property was arbitrarily favored in the
199 laying out of said district, in pursuance of a promise by the Sewer Commissioner of the City of St. Louis, a member of said Board of Public Service to exempt said property from the Taxing District, upon conveyance to this City by the Owners of said Kuhs property of certain easement of right of way for the said district sewer, except certain strips of said property which were included in the district for the purpose of permitting the connection of the Kuhs property with the said sewer, and that the Board of Aldermen acting solely upon the recommendation of the Board of Public Service and without affording the owners of property a hearing and without independent investigation of the facts adopted the ordinances establishing the district, and that the Board of Public Service further acted arbitrarily, oppressively and fraudulently in exempting the property of the Calvary Cemetery Association from said District.

That the said special tax bills are unlawful and void for the further reason that the charter of the City of St. Louis prescribed a rule for the establishment of the district in which the cost of construction of a district sewer is to be assessed, without regard to any consideration of the difference in benefits conferred upon the real estate coming within such arbitrarily defined district. That the said provisions of the Charter of the City of St. Louis are arbitrarily and unreasonable and result in the distributing of such tax in grossly unequal proportions, and that the said tax was under the said Charter provisions and the ordinance enacted in pursuance thereto mechanically apportioned as hereinbefore set forth, by assessing the whole cost of said sewer as a special tax against all of the lots or parcels of ground in said sewer district in the ratio that each parcel and lot of ground bears to the area of the whole district, exclusive of the area of streets, avenues, public highways and alleys, without any consideration of the benefits, if any, conferred upon the land so taxed. That the said charter provisions and the said ordinance are violative of the Fourteenth Amendment to the Constitution of the United States, in that they deny to plaintiff the equal protection of the laws and constitute a taking of plaintiff's property
200 without due process of law and without adequate compensation.

That said special tax bill is unlawful and void in that the assessment and levy of said tax upon plaintiff's property amounts to confiscation thereof for public use and constitutes taking property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and in violation of Sections 20 and 30 of Article II of the Constitution of the State of Missouri.

III. That defendant duly filed a general denial, excepting the admission of ownership of the tax bill in suit; that thereafter said cause came on for hearing before the Honorable Wilson A. Taylor, Judge of the said Circuit Court in Division No. 2 thereof during the June Term 1918 of said Court, on the 4th day of June, 1918, on which day the trial thereof was finished and taken under advisement by the Court until the 30th day of December, 1918, during the December Term of said Circuit Court, when the Court rendered and entered its judgment for defendant and dismissing Plaintiff's bill to which finding and judgment your petitioner duly excepted; and thereupon within 4 days thereafter and during said December Term 1918, to-wit, on the 3rd day of January, 1919, plaintiff filed its motion for a new trial in which your petitioner prayed the Court to set aside its finding and judgment in favor of defendant and dismissing your petitioner's bill and to grant to your petitioner a rehearing, assigning as grounds for its said motion among others, the following:

That under the law and the evidence the tax bill described in the petition is unlawful and void, for the reason that the ordinance establishing the sewer district upon which the tax for the construction of Baden District Sewer No. 2 was levied, is arbitrary, unjust, oppressive and fraudulent.

That the said tax bill is unlawful and void for the reason that the Charter of the City of St. Louis, under authority of which said tax bill was issued, prescribes a rule for the establishment of the taxing district for private sewers without regard to any consideration of the difference in benefit conferred upon the real estate coming within such arbitrarily defined district. That the said provisions of the Charter of the City of St. Louis are arbitrary and unreasonable and result in the distributing of such tax in grossly unequal proportions. That said charter provisions and the ordinance enacted in pursuance thereto, and by authority of which the tax bill de-
201 scribed in the petition was issued, are violative of the Fourteenth Amendment to the Constitution of the United States, in that they deny to plaintiff the equal protection of the laws and constitute a taking of plaintiff's property without due process of law and without adequate compensation.

That said special tax bill is unlawful and void and the assessment and levy of said tax upon plaintiff's property amounts to confiscation thereof for public use, constitutes the taking of property without due process of law, violates the Fourteenth Amendment of the Constitution of the United States, and violates Sections 20 and 30 of Article II of the Constitution of the State of Missouri.

That the ordinance establishing the taxing district upon which the special tax bill described in the petition was based, is invalid because no notice or opportunity to be heard upon the establishment of said taxing district was given plaintiff, in violation of the provisions for due process of law of the Constitution of the United States and of the State of Missouri.

That thereafter your petitioner's motion for a rehearing was on the 17th day of March, 1919, during the February Term of said

Court overruled by the Court, to which your petitioner duly excepted and on the 24th day of March, 1919, during said February Term of Court, plaintiff duly appealed to this Honorable Court, (and filed its Appeal Bond, which was approved by said Court).

IV. That thereafter said cause came on to be heard by this Honorable Court in Division No. 1 thereof, during the October Term, 1920 to-wit: on the 6th day of January, 1921, and your petitioner by counsel, having previously duly filed abstracts of the record and briefs, argued that the judgment of the Circuit Court should be reversed and said Circuit Court directed to enter a judgment in favor of your petitioner declaring the said special tax bill to be void and cancelling the same, assigning as reasons therefor among others:

That said tax bill is unlawful and void because the charter of St. Louis, under authority of which it was issued, prescribes a rule for the establishment of taxing districts for district sewers without regard to any consideration of the difference in benefit conferred upon the real estate coming within such arbitrarily defined district. That said provisions of said charter are arbitrary and unreasonable and result in distributing such tax in grossly unequal proportions.

202 That said charter provisions and the ordinance enacted in pursuance thereto and by authority of which the tax bill in suit was issued, are violative of the Fifth and Fourteenth Amendments to the Constitution of the United States in that there were arbitrarily omitted and excluded from the taxing district certain areas of land known as the Kuhs and Calvary Cemetery properties, both of which are in the natural drainage area of the sewer constructed under the assessment, which properties stand in the same relative position to the sewer as the land of appellant, plaintiff in error, thereby imposing upon appellant, plaintiff in error, an unequal proportion of the cost of said sewer and further violated said amendments in that the drain constructed under said charter provision and ordinance, was made 20% larger than required to drain the taxing district, in order to drain the said Kuhs and Calvary Cemetary properties, thereby denying to plaintiff equal protection of the laws, and constituted the taking of plaintiff's property without due process of law and without adequate compensation.

That said tax upon plaintiff's property amounts to confiscation thereof for public use, constitutes taking of property without due process of law, violates the Fourteenth Amendment to the Constitution of the United States and violates Sections 20 and 30 of Article II of the Constitution of Missouri, and the Court erred in not so holding.

That the ordinance establishing the taxing district is invalid because no notice or opportunity to be heard upon the establishment of said taxing district was given plaintiff, in violation of the provisions for process of law of the Constitutions of the United States and of the State of Missouri, and it was error of the Supreme Court of the State of Missouri in not so holding. That thereafter to-wit, on the 11th day of April, 1921 and during the October Term, 1920 of this Honorable Court by Division No. 1 thereof rendered its judg-

ment in said cause affirming the judgment of the said Circuit Court in favor of respondent and dismissing your petitioner's bill, said Court rendering its decision by the Honorable A. M. Woodson, Presiding Justice of said Division, to which judgment of this
203 Honorable Court your petitioner excepted and continues to except.

V. That thereafter to-wit, during said October Term, 1920 and within 10 days of the rendition of said judgment, your petitioner duly filed its motions for a rehearing and to transfer the cause to the Court in Banc assigning among other reasons why a rehearing should be granted:

That another question decisive of the case and duly submitted by counsel has been overlooked by the Court. That said question is that the provisions of the Charter of the City of St. Louis relating to the establishment of taxing districts for district sewers and the provisions of the ordinances under which the tax bill in suit was issued, are violative of the due process clause of the Federal Constitution.

and in its motion to transfer this cause to the Court in Banc for consideration in compliance with Section IV of the Amendment of 1890 to Article VI of the Constitution of the State of Missouri, your petitioner assigned as its reason for said motion that a Federal question was involved setting forth in substance, the allegations thereof contained in its petition, its motion for a new trial in the Circuit Court and its assignments of error in this Court, raising the question of the violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, but that this Court in Division No. 1, nevertheless on the 6th day of June, 1921 overruled said Motions for a Rehearing and to transfer the cause to the Court in Banc, and on said 6th day of June, 1921 entered of record its final judgment affirming the judgment of the Circuit Court dismissing plaintiff's bill.

VI. That upon the trial of this cause in the Circuit Court, in support of its Motion for a rehearing in said Court, upon appeal to this Court and upon the motions subsequent thereto above mentioned, your petitioner duly raised the issue and argued and asked that the Special Tax bill in suit be declared invalid and cancelled for the reason that its issuance and the consequent lien imposed upon the property of your petition were in violation of the Fourteenth Amendment to the Constitution of the United States because no notice was given or hearing had upon the question of benefits in the establishment of the taxing district, and that consequently plaintiff
204 was denied due process of law guaranteed by said Amendment; that the Charter provisions and ordinance under which said tax bill was issued are arbitrary and unreasonable and repugnant to the Constitution of the United States and the State of Missouri, and distributed the tax in grossly unequal proportions, denying to your petitioner the equal protection of the law and constituting the taking of property without due process of law and without adequate

compensation as guaranteed by said Amendment; and that the tax thus levied by said tax bill amounted to confiscation of your petitioner's property for public use and constituted the taking of property without due process of law guaranteed by said amendment; but that said Circuit Court and this Court, and each of them and the Judges thereof have denied to your petitioner the title, right, privilege, and immunity held by your petitioner under the Constitution of the United States and Amendments thereto, and that there is drawn in question the validity of an authority exercised under the said Charter and ordinance on the ground that the same are repugnant to the Constitution of the United States, the validity of which have been upheld by this Court and the said Circuit Court.

Wherefore, your petitioner prays that a writ of error may be issued and that it may be allowed to bring up for review before the Supreme Court of the United States, the said order and judgment of this Court and that your petitioner may have such other and further relief in the premises as may be just; and your petitioner will ever pray.

ST. LOUIS MALLEABLE CASTING COMPANY,
By HENRY LUEDINGHAUS,
President.

WALTHER, MUENCH & HECKER,
Attorneys for Petitioner.

STATE OF MISSOURI,
City of St. Louis, ss:

Henry Luedinghaus, being duly sworn, deposes and says that he is President of the St. Louis Malleable Casting Company, the foregoing petitioner; that the foregoing petition is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes the same to be true.

HENRY LUEDINGHAUS.

Subscribed and sworn to before me this 13th day of July, 1921.

HELEN SCHAUMAN,
Notary Public.

My term expires May 15/25.

205 In the Supreme Court of Missouri.

No. 21710.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corporation, Appellant-Plaintiff in Error,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, a Corporation, Respondent-Defendant in Error.

Assignment of Errors.

Comes now the St. Louis Malleable Casting Company, the petitioner and plaintiff in error, by Walther, Muench & Hecker, its Attorneys, and in connection with its petition for a writ of error, shows that in the records and proceedings and in the rendering of the judgment and the decision of the Supreme Court of the State of Missouri, in the above-entitled cause, manifest error intervened to the prejudice of this petitioner, in the following particulars, to-wit:

1. That the Supreme Court of the State of Missouri erred in affirming the judgment of the Circuit Court of the City of St. Louis, Missouri.

2. That the Supreme Court of the State of Missouri erred in affirming the judgment of the Circuit Court and in overruling each of the assignments of error heretofore made by appellant-plaintiff in error, this petitioner.

3. That the Supreme Court of the State of Missouri erred in sustaining the tax bill in suit for the reason that said tax bill is unlawful and void, in that the ordinance establishing the sewer assessment for which said tax-bill was issued, is arbitrary, unjust, oppressive and fraudulent and violates Section 1 of the 14th Amendment to the Constitution of the United States, in that it
206 abridges the privileges and immunities of the petitioner and plaintiff in error, a citizen of the United States, and deprives it of its property without due process of law, and denies petitioner equal protection of the laws.

4. That the Supreme Court of the State of Missouri erred in declaring said tax-bill to be lawful and valid, because the Charter of the City of St. Louis, under authority of which it was issued, prescribes a rule for the establishment of taxing districts for district sewers without regard to any consideration of the difference in benefit conferred upon the real estate coming within such arbitrarily defined district. That said provisions of said charter are arbitrary and unreasonable and result in distributing such tax in grossly unequal proportions. That said Charter provisions and the ordinance enacted

in pursuance thereto and by authority of which the tax bill in suit was issued, are violative of the Fourteenth Amendment to the Constitution of the United States, in that they deny to plaintiff the equal protection of the laws and constitute a taking of plaintiff's property without due process of law and without adequate compensation.

5. That the Supreme Court of the State of Missouri erred in affirming the judgment of the Circuit Court dismissing plaintiff's petition and declaring said tax-bill to be valid; that the tax imposed by said tax-bill upon the plaintiff's property amounts to a confiscation thereof for public use, constitutes a taking of property without due process of law, and therefore violates Section 1 of the 14th Amendment and the 5th Amendment to the Constitution of the United States.

6. That the Supreme Court of the State of Missouri erred in upholding and declaring valid the ordinance establishing the taxing district, for the reason that no notice or opportunity to be heard upon the establishing of said taxing district was given to plaintiff, and that the tax levied and assessed against the property of petitioner and plaintiff in error, constitutes the taking of property without due process of law and therefore violates Section 1 of the 14th Amendment to the Constitution of the United States.

7. That the Supreme Court of the State of Missouri erred in affirming the judgment of the Circuit Court dismissing plaintiff's
207 bill and declaring said tax bill to be valid, for the reason that said tax imposes upon Plaintiff in Error, a wholly unjust and grossly unequal proportion of the cost of construction of the sewer authorized by the Charter provisions and ordinances under authority of which said tax bill was issued by excluding and omitting from the taxing district thereby created, the large areas of land known as the Kuhs and Calvary Cemetery Properties, which properties stand in the same relative position to the sewer as the land of Plaintiff in Error and are drained thereby; and further imposes upon Plaintiff in Error and other owners of land within said taxing district the cost of construction of a sewer of greater size and capacity than was necessary or required to drain the lands within said district, and one of sufficient size to drain the said Kuhs and Calvary Cemetary properties, excluded from said district as aforesaid, and thereby denies Plaintiff in Error equal protection of the laws, amounts to the confiscation of its property for a public use, and the taking of its property without due process of law and without adequate compensation and therefore violates the Fifth and Fourteenth Amendments to the Constitution of the United States.

By reason whereof, this Petitioner and plaintiff in error prays that the said judgment of the Supreme Court of the State of Missouri may be reversed and that said Court be directed to reverse the judgment of the Circuit Court of the City of St. Louis, Missouri, directing said Circuot Court to enter of record a judgment and decree cancelling the said tax-bills in accordance with the prayer of the peti-

tion in said cause filed, and that such other and further relief may be granted it as to the Court may seem proper.

By WALTHER, MUENCH & HECKER,
Attorneys for said Petitioner and Plaintiff in Error.

207½ [Endorsed:] No. 21,710. In the Supreme Court of Missouri. October Term, 1920. St. Louis Malleable Casting Company, a corporation, vs. The George G. Prendergast Construction Company, a corporation. Petition for writ of error to the Supreme Court of the United States and assignment of errors. Writ of error granted 7-22-21. James T. Blair, C. J. Bond fixed at $1,000.00. J. T. B. Law offices of Walther, Muench & Hecker, Saint Louis. Filed Jul. 22, 1921. J. D. Allen.

208 In the Supreme Court of Missouri, April Term, 1921.

No. 21710.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corporation, Plaintiff in Error-Appellant,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, a Corporation, Defendant in Error-Respondent.

Order Allowing Writ of Error from the Supreme Court of the United States.

On reading of the petition of the St. Louis Malleable Casting Company for a Writ of Error and the Assignment of Errors, and upon due consideration of the Record of said Cause, it is ordered, that a Writ of Error be allowed from the Supreme Court of the United States to the Supreme Court of the State of Missouri as prayed for in said petition, and that said Writ of Error and Citation, therein be issued, served and returned to the Supreme Court of the United States in accordance with the law, upon condition that said petitioner, Plaintiff in Error, shall give security in the sum of One Thousand Dollars, that said Plaintiff in Error shall prosecute said Writ of Error to effect, and if said plaintiff in error fails to make its plea good, it shall answer to Defendant in Error for all costs and damages that may be adjudged or decreed on account of said Writ of Error. And the said Plaintiff in Error now presenting said bond in the sum of One Thousand Dollars ($1,000.00), with the Southern Surety Company, a corporation, as Surety, it is ordered that the same be and hereby is duly approved.

In witness whereof, I have hereunto set my hand this 22nd, day of July, 1921.

JAMES T. BLAIR,
Chief Justice of the Supreme Court of the State of Missouri.

208½ [Endorsed:] No. 21710. In the Supreme Court of Missouri. St. Louis Malleable Casting Company, a corporation, vs. The George G. Prendergast Construction Company, a corporation. Order allowing writ of error. Filed Jul. 22, 1921. J. D. Allen, Clerk Supreme Court. Law offices of Walther, Muench & Hecker, Saint Louis.

209 Copy.

In the Supreme Court of Missouri, April Term, 1921.

No. 21710.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corporation, Plaintiff in Error, Appellant,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, a Corporation, Defendant in Error, Respondent.

Know all men by these presents:

That we, St. Louis Malleable Casting Company, a corporation as Principal, and the Southern Surety Company, a corporation, as Surety, both of the City of St. Louis, Missouri, are held and firmly bound unto the above named The George G. Prendergast Construction Company, a corporation, in the sum of One Thousand Dollars ($1,000.00) to be paid to the George G. Prendergast Construction Company, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 22d day of July, A. D. 1921.

Whereas, the above-named St. Louis Malleable Casting Company has sued out a writ of error from the Supreme Court of the United States, to the Supreme Court of the State of Missouri to reverse the judgment and decree rendered by the Supreme Court of the State of Missouri, in the suit of the St. Louis Malleable Casting Company against the George G. Prendergast Construction —, being No. 21710.

Now, therefore, the condition of this obligation is such that, if the above named Plaintiff in Error, St. Louis Malleable Casting Company shall prosecute said writ of error to effect and an-
210 swer all damages and costs that may be adjudged, if it fails to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

[Seal of Saint Louis Malleable Casting Company, Saint Louis, Mo.]

ST. LOUIS MALLEABLE CASTING COMPANY,
By HENRY LUEDINGHAUS,
President.

Attest:
CHAS. G. ETTE,
Secretary.

[Corporate Seal of Southern Surety Company, Iowa.]

SOUTHERN SURETY COMPANY,
By H. H. BUTLER,
Attorney in Fact.

Approved this 22nd day of July, 1921.
JAMES T. BLAIR,
Chief Justice of the Supreme Court of the State of Missouri.

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Copy.

Southern Surety Company.

Home Office—Des Moines, Iowa.

Power of Attorney.

Know all men by these presents: That the Southern Surety Company, a corporation organized and existing under the laws of the State of Iowa, with Home Office at Des Moines, Iowa, in pursuance of provisions of its by-laws, a copy of such portion thereof being attached hereto, does hereby nominate, constitute and appoint Lon W. Harlow or H. H. Butler, St. Louis, Mo. its true and lawful agent and attorney-in-fact with authority during the year 1921 to make, execute and deliver, for and on its behalf, as surety, and as its act and deed, any and all bonds.

And the execution and acknowledgment of any such bond by either Lon W. Harlow or the said H. H. Butler, in pursuance of these presents, shall be as binding upon said company, as fully and amply, to all intents and purposes, as if such bond had been duly executed and acknowledged by the regularly elected officers of the company in their own proper person.

All authority hereby conferred shall expire and terminate, without notice, at midnight of December 31, 1921.

In witness whereof, the said Southern Surety Company has caused these presents to be executed by its vice president and its secretary, with its corporate seal affixed, this 20th day of December, 1920.

SOUTHERN SURETY COMPANY,
By J. H. HUCKLEBERRY,
Vice-President.

Attest:
E. G. DAVIS,
Secretary.

I hereby certify that the following is a true and correct copy of Sections 13, 14 and 15, of Article VIII, of the by-laws of the Southern Surety Company, duly adopted and recorded, to-wit:

Section 13. The president, or the first or second vice-president or any vice-president so authorized by the board of directors, or the executive committee, joined with the secretary or an assistant secretary, may, from time to time, by written power of attorney, appoint agents and attorneys-in-fact, and authorize them to perform the acts in such power of attorney stated, and either the president or any vice-president or secretary, or the board of directors, or the executive committee may at any time revoke any such appointment.

Section 14. Agents and attorneys-in-fact shall have their powers granted by written power of attorney, and shall have and exercise only such powers and be authorized to bind the company only to the extent and in the manner distinctly expressed in such written power of attorney.

Section 15. Sections 13 and 14 of this article shall be copied in every power of attorney issued by the company.

In testimony whereof, I have hereunto subscribed my name as secretary, and affixed the corporate seal of the company, this 20th day of December, 1920.

[Seal of Southern Surety Company, Iowa.]

E. G. DAVIS,
Secretary.

STATE OF IOWA,
County of Polk, ss:

On this 20th day of December, 1920, before me appeared J. H. Huckleberry and E. G. Davis, to me personally known, who, being by me duly sworn, did say that they are respectively the vice president and secretary of Southern Surety Company, a corporation, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said J. H. Huckleberry and E. G. Davis, acknowledged said instrument to be the voluntary act and deed of said corporation.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, the day and year first above written.

[Notarial seal of S. D. Hubbard, Iowa.]

S. D. HUBBARD,
Notary Public.

My commission expires July 4, 1924.

(Indorsements on Bond:) No. 21,710. In the Supreme Court of Missouri. St. Louis Malleable Casting Company, a corporation, vs. The George G. Prendergast Construction Company, a corporation. Bond. Filed Jul- 22, 1921. J. D. Allen, Clerk.

212 In the Supreme Court of the State of Missouri, April Term, 1921.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corporation, Plaintiff in Error,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, a Corporation, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Justices of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the judgment of a plea which is in the said Supreme Court of the State of Missouri before you, or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had in the said suit between St. Louis Malleable Casting Company, a corporation, Plaintiff in Error and The George G. Prendergast Construction Company, a corporation, Defendant in Error, wherein there was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was in favor of their validity: or wherein was drawn the validity of a Statute of or an authority exercised under said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of their validity, or wherein was drawn the construction of a clause of the Constitution, or of a treaty or Statute of, or Commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission: a manifest error hath happened to the great damage of the said St. Louis Malleable Casting Company, as by its complaint appears. We being willing that error, if any hath been should be duly corrected and full and speedy justice done to
213 the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date thereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 22nd day of July, in the year of our Lord, One Thousand nine hundred twenty-one.

[Seal of the United States District Court of Missouri, Central Division, Western District.]

EDWIN R. DURHAM,
Clerk,

By H. C. GEISBERG,
Deputy Clerk of the District Court of the United States for the Western District of Missouri, Central Division.

Allowed by:
JAMES T. BLAIR,
Chief Justice of the Supreme Court of the State of Missouri.

213½ [Endorsed:] No. 21710. In the Supreme Court of Missouri. St. Louis Malleable Casting Company, a Corporation, vs. The George G. Prendergast Construction Company, a Corporation. Writ of error. Filed Jul. 22, 1921. J. D. Allen, Clerk Supreme Court. Law offices of Walther, Muench & Hecker, Saint Louis.

214 In the Supreme Court of Missouri, April Term, 1921.

No. 21710.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corporation, Plaintiff in Error, Appellant,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, a Corporation, Defendant in Error, Respondent.

Citation.

UNITED STATES OF AMERICA:

To the George G. Prendergast Construction Company or Messrs. Rodgers and Koerner, its attorneys of record:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Missouri, wherein the St. Louis Malleable Casting Company, a Corporation is Plaintiff in Error and The George G. Prendergast Construction Company, a corporation is Defendant in Error, to show cause, if any there should be, why the judgment rendered against the said Plaintiff in Error, as in said writ of error mentioned, should not be cor-

rected and why speedy justice should not be done to the parties in that behalf.

Witness the hand and seal of the Honorable Chief Justice of the Supreme Court of the State of Missouri this 22 day of July, 1921.

[Seal of the Supreme Court of Missouri.]

JAMES T. BLAIR, [SEAL.]
Chief Justice of the Supreme Court of the State of Missouri.

Attest:
J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

215 St. Louis, Missouri, July 23, 1921.

Received in due time a true copy of the foregoing citation at the City of St. Louis, Missouri. All objections as to time and manner of service being waived.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
By RODGERS & KOERNER,
Its Attorneys of Record.

215½ [Endorsed:] No. 21710. In the Supreme Court of Missouri. St. Louis Malleable Casting Company, a Corporation, vs. The George G. Prendergast Construction Company, a Corporation. Citation. Filed Jul. 26, 1921. J. D. Allen, Clerk Supreme Court. Law Offices of Walther, Muench & Hecker, St. Louis.

216 In the Supreme Court of Missouri, April Term, 1921.

No. 21710.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corporation, Plaintiff in Error-Appellant,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION —, a Corporation, Defendant in Error-Respondent.

To Messrs. Rodgers & Koerner, Attorneys for The George G. Prendergast Construction Company, Defendant in Error:

Please take notice that on the 22nd day of July, 1921 the undersigned filed with the Clerk of the Supreme Court of the State of Missouri, a Præcipe for the record to be transmitted to the Supreme Court of the United States on Writ of Error sued out in the above cause a copy of which Præcipe is herewith served on you.

Dated this 23rd day of July, 1921.

WALTHER, MUENCH AND HECKER,
Attorneys for St. Louis Malleable Casting Company, Plaintiff in Error-Appellant.

Service of the within notice and copy of the Præcipe is hereby accepted this 25 day of July, 1921.

RODGERS & KOERNER,
Attorneys for Defendant in Error-Respondent.

217 In the Supreme Court of Missouri, April Term, 1921.

No. 21710.

ST. LOUIS MALLEABLE CASTING COMPANY, a Corporation, Plaintiff in Error-Appellant,

vs.

THE GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, a Corporation, Defendant in Error-Respondent.

Præcipe for Authenticated Transcript of Record.

Honorable Jacob D. Allen, Clerk of the Supreme Court of Missouri:

You are respectfully requested to prepare an authenticated copy of the record in the above entitled cause consisting of the following documents and entries:

(1) Transcript of Judgment of the Circuit Court of the City of St. Louis, Div. No. 2;

(2) Appellant's Abstract of Record;

(3) Opinion of Woodson, J., dated April 11, 1921;

(4) Appellant's Motion for Re-hearing;

(5) Appellant's Motion to Transfer to Court en banc;

(6) Orders overruling said Motions;

(7) Final Judgment of the Supreme Court;

(8) Petition for Writ of Error, with Assignment of Errors, and Order of Allowance of Writ;

(9) Copy of Bond, with Order of Approval;

(10) Writ of Error.

(11) Citation to Defendant in Error.

WALTHER, MUENCH AND HECKER,
Attorneys for Appellant-Plaintiff in Error.

Received a copy of the foregoing Præcipe this 23rd day of July, 1921 at St. Louis, Missouri.

RODGERS & KOERNER.

217½ [Endorsed:] No. 21710. In the Supreme Court of Missouri. St. Louis Malleable Casting Company, a Corpora-

tion, vs. The George G. Prendergast Construction Company, a Corporation. Præcipe for Transcript of Record. Filed Jul. 26, 1921. J. D. Allen, Clerk Supreme Court. Law Offices of Walther, Muench & Hecker, Saint Louis.

218 STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, in obedience to the mandate of the within writ of error, and as directed by the within præcipe for authenticated transcript of record, herewith transmit to the Honorable Supreme Court of the United States, a full, true and complete transcript of the record and proceedings in a cause between St. Louis Malleable Casting Company, a Corporation, Appellant, and The George G. Prendergast Construction Company, a Corporation, Respondent, No. 21710, as fully as the same appear of record and on file in my office, to which said transcript are attached, and made part thereof, appellant's petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, assignment of errors, the order allowing writ of error, copy of bond and order of approval, writ of error, citation to Defendant in Error, and præcipe for authenticated transcript of record, with notice and service thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said Supreme Court of the State of Missouri, at my office in the City of Jefferson, State aforesaid, this 3rd day of August, 1921.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court
of the State of Missouri,
By PATRICIA NACY,
Deputy.

Endorsed on cover: File No. 28,440. Missouri Supreme Court. Term No. 485. St. Louis Malleable Casting Company, plaintiff in error, vs. George G. Prendergast Construction Company. Filed August 22d, 1921. File No. 28,440.

(28,440)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

ST. LOUIS MALLEABLE CASTING COMPANY,
Plaintiff in Error,
vs.
GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Defendant in Error.

No. [illegible] 154

In Error to the Supreme Court of Missouri.

STATEMENT, BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

LAMBERT E. WALTHER,
Attorney for Plaintiff in Error.

JOHN S. LEAHY,
WALTER H. SAUNDERS,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 N. Eighth St. Main 1819, Central 919.

SUBJECT INDEX.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

ST. LOUIS MALLEABLE CASTING COMPANY, Plaintiff in Error, vs. GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, Defendant in Error.	No. 485.

In Error to the Supreme Court of Missouri.

STATEMENT, BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT.

This is a suit in equity instituted in the Circuit Court of the City of St. Louis seeking to have a special tax bill issued against the property of the plaintiff for the construction of a district sewer declared invalid and canceled. The petition attacked the tax bill on the following grounds:

(1) That the assessment against plaintiff's property was excessive, unlawful and void for the reason that the taxing district established by ordinance of the municipality did not include large areas of land within the drainage area of the sewers, and which properties stand in the same relative position as plaintiff's with respect to the said sewer, and derived and were so situated as to be capable of deriving the same amount of benefit from said sewer as the property of plaintiff. That by reason of the omission and exemption of these large tracts of land from their just share of the tax to pay the cost of the construction of the sewer, an unreasonable and excessive proportion of the tax has been assessed against the property of plaintiff.

(2) That the ordinance establishing the taxing district and the provisions of the Charter of the City of St. Louis purporting to authorize the Board of Aldermen to establish a sewer district designating lands of private owners to be specially taxed to pay the entire cost of said sewer violate the Fourteenth Article of the Amendments to the Constitution of the United States, in that they determine that said lands within the district prescribed by said ordinance would be benefited by said sewer and should be and were especially assessed therefor, as well as the apportionment of said taxes between the several lots or parcels of land and their respective owners within

said district, without any hearing being accorded to the owners of said lands upon such determination, thereby denying plaintiff due process of law.

(3) That by the establishment of said sewer district and the imposition of said entire cost of the said district sewer upon the property therein, as ordained by the ordinance aforesaid, and by the exclusion of the land as aforesaid from the taxation of the cost of said sewer, although such lands so excluded will be drained by said sewer and share equally with the property of plaintiff and other properties in said defined district in the benefits resulting from the construction of said sewer, plaintiff has been denied due process of law and the equal protection of the law guaranteed to plaintiff by the Fourteenth Article of the Amendments to the Constitution of the United States.

(4) That the establishment of said sewer district and the levying of said tax by the ordinance aforesaid was and is arbitrary, unjust, oppressive and fraudulent. That the fraud consisted of exempting from the tax a parcel of land about the same area as plaintiff's and lying immediately north of plaintiff's property and referred to in the evidence as the "Kuhs" property, and in leaving out the portion of Calvary Cemetery within the drainage district, consisting of about twenty-three acres. That the sewer was so constructed as to surround the "Kuhs" prop-

erty and with "slants" to allow for connection with said property. That the said properties were omitted from the taxing district as the result of favoritism on the part of the Board of Public Service and the result of an unlawful bargain to exempt the "Kuhs" property in consideration of the granting of a right of way for the sewer and the agreement upon the part of the Cemetery Association to construct a private drain. That the plaintiff had also granted to the city, for the nominal consideration of one dollar, a right of way for the said sewer and had an adequate private sewer of its own, connected with the city's public sewer. That all of the "Kuhs" property was excluded from the taxing district except a narrow strip of seven feet six inches in width along the western line of the property and a strip fifty feet in width along the eastern part of the property and that these two strips of the "Kuhs" property were left in the taxing district for the fraudulent purpose of permitting connection of the entire property with the district sewer. That the Board of Public Service and the Board of Aldermen, in adopting the taxing ordinance recommended by the Board of Public Service, acted arbitrarily, oppressively and fraudulently.

(5) That the special tax bill is unlawful and void for the further reason that the Charter of the City of St. Louis prescribes a rule for the establishment of the district in which the cost of construction of a

district sewer is to be assessed, without regard to any consideration of the difference in benefits conferred upon the real estate coming within such arbitrarily defined district. That the said provisions of the Charter of the City of St. Louis are arbitrary and unreasonable and result in the distributing of such tax in grossly unequal proportions, and that the said tax was under the said charter provisions and the ordinance enacted in pursuance thereto mechanically apportioned as hereinbefore set forth, by assessing the whole cost of said sewer as a special tax against all of the lots or parcels of ground in said sewer district in the ratio that each parcel and lot of ground bears to the area of the whole district, exclusive of the area of streets, avenues, public highways and alleys, without any consideration of the benefits, if any, conferred upon the land so taxed. That the said charter provisions and the said ordinance are violative of the Fourteenth Amendment to the Constitution of the United States, in that they deny to plaintiff the equal protection of the laws and constitute a taking of plaintiff's property without due process of law and without adequate compensation.

(6) That said special tax bill was unlawful and void in that the assessment and levy of said tax upon plaintiff's property amounts to confiscation thereof for public use and constitutes taking property without due process of law, in violation of the Four-

teenth Amendment to the Constitution of the United States, and in violation of Sections 20 and 30 of Article II of the Constitution of the State of Missouri.

The answer of the defendant was a general denial, excepting the admission that it was owner of the special tax bill mentioned in the petition.

The Circuit Court, upon hearing upon the merits, dismissed plaintiff's bill, and the Supreme Court of the State of Missouri affirmed the judgment. The case comes to this Court upon writ of error.

The Federal Constitutional questions raised by the petition were preserved in the motion for rehearing in the Circuit Court, by the assignment of errors in the State Supeme Court and by the motion for rehearing in the latter.

The opinion of the Supreme Court of Missouri (Tr., pp. 102-108) sets forth the evidence establishing the facts as alleged in the petition respecting the relation to the sewer of the "Kuhs" and Calvary Cemetery properties omitted from the taxing district. The transcripts of the proceedings of the Board of Public Service, which are in evidence, are quoted from in the Supreme Court's opinion, the quotations showing that the Commissioners, in establishing the taxing district so as to leave out the "Kuhs" and cemetery properties, were moved by considerations other than the equal distribution of benefits. That the exempting of the "Kuhs" prop-

erty was the result of an unlawful bargain upon the part of the Sewer Commissioner in consideration of the granting of a right of way, and the exemption of the cemetery property was in consideration of an agreement by the Cemetery Association to construct a private drain, which would cost $4,500.00, whereas, the estimated portion of the tax assessable against the cemetery property, if it had been included within the taxing district, was $12,000.00 (Tr., p. 105). The opinion quotes a statement from the president of the Board of Public Service, made at a meeting of the board at which the laying out of the taxing district was under consideration, to the effect that if the cemetery property were excluded, it would impose upon the property owners of the district an additional burden. To which the Sewer Commissioner replied that the only thing he saw could be done would be to move the line over "arbitrarily" a portion of the distance (Opinion, Tr., p. 104).

The total area of the taxing district, as laid out, is 2,296,039 square feet, and the total area within the natural drainage district is 3,634,919 square feet. The only properties within the natural drainage area which were excluded and exempted were the "Kuhs" property, containing 317,398 square feet, and the Calvary Cemetery property of twenty-three and a fraction acres. Accordingly, only 63.17 per

cent of the area in the natural drainage district was included in the taxing district (Opinion, Tr., p. 106). The sizes of the sewers were planned for the entire drainage district and not reduced after the elimination of the "Kuhs" and Calvary Cemetery properties from the taxing district, and the Supreme Court, in its opinion (Tr., p. 106), states: The size of the district sewer is greater than is necessary for the draining of the area taxed."

A plat showing the taxing district is in evidence and is found at page 20 of the transcript. This plat shows the total cost of the improvement to be $65,744.67 and the assessment against plaintiff in error, $9,168.86

The provisions of the Charter of the City of St. Louis prescribing the method of assessing taxes for the cost of construction of district sewers are contained in Article XXII, section 3, of the charter as follows:

> "Before the Board of Public Service shall recommend an ordinance for any public work or improvement, including the construction or other improvement of any public highway, street, boulevard, parkway, alley, sidewalk or sewer, or any part thereof, to be paid for by special assessments, the Board of Aldermen, on recommendation of the Board of Public Service, shall establish a benefit or taxing district, and as to a sewer shall establish or shall have established a sewer district or joint sewer district against the prop-

> erty in which it is proposed to assess benefits for the payment in whole or in part of the cost and expense of such work or improvement, and the Board of Public Service shall thereupon designate a day on which it will consider the projected work or improvement, and shall give two weeks public notice in the paper or papers doing the city publishing, of the time, place and matter to be considered, and of the estimated cost of the work or improvement, which estimate may cover special classes of material."

The notice provided for in this section relates merely to the character of the improvement and is not to be given until after the taxing district has been established. It is not a notice of a hearing upon the extent of the taxing district nor the apportionment of the tax.

By section 16 of Article XXII of the charter it is provided as follows:

> "All ordinances for constructing, reconstructing or acquiring district and joint district sewers shall provide for payment thereof by special assessment as follows: The entire cost and expense shall be levied and assessed as a special tax ratably by area on all the lots or parcels of ground within the district or joint district, excluding public highways only."

The Board of Public Service (or as it was called under the prior Charter of the City of St. Louis, the Board of Public Improvements) consists of the presi-

dent of the board and the Directors of Public Utilities, Streets and Sewers, Public Welfare and Public Safety. It is an administrative board. Ordinances for public improvements and the defining of taxing districts for local improvements must originate with the Board of Public Service. The Board of Public Service recommends the bills for the creation of the taxing district and the making of the public improvement, and the Board of Aldermen, the legislative body of the municipality, must either pass or reject the bills as recommended by the Board of Public Service, the Board of Aldermen having no power to amend such measures (Opinion, Tr., p. 103).

ERRORS RELIED UPON.

1. The Supreme Court of Missouri erred in holding in this cause that no notice or opportunity to be heard upon the establishment of the taxing district was necessary to the validity of the tax.

2. The Supreme Court of Missouri erred in holding that the application of the ordinance in question and the provisions of the Charter of the City of St. Louis, Article XXII, Sections 3 and 16, did not take the property of plaintiff in error without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. That the ordinance establishing the taxing district and the assessment arising thereon are arbitrary, unequal and unjust, because a large amount of property benefited by the sewer has not been assessed and thereby the property of plaintiff in error was obliged to bear an unequal portion of the cost and thereby plaintiff in error has been denied the equal protection of the laws and its property has been taken without due process of law and confiscated, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States. That the Supreme Court of Missouri in this case erred in not holding the said ordinance and assessment invalid upon said grounds.

4. That the Supreme Court of Missouri erred in holding in this case that the provisions of Sections 3 and 16 of Article XXII of the Charter of the City of St. Louis were constitutionally applied to the property of plaintiff in error, when it is apparent from the record and findings of the Court that the taxing district was arbitrarily defined and not based upon the special benefits accruing from the improvement and resulted in a greatly disproportionate burden upon plaintiff in error, because property of others similarly located and deriving the same benefits from the sewer was not assessed, thereby denying plaintiff in error the equal protection of the laws and taking its property without due process of law.

POINTS AND AUTHORITIES.

I.

Notice and Opportunity to be Heard.

(a) When the state delegates the authority to levy and impose special taxes, notice and hearing are necessary to the constitutionality of the exercise of such power.

Embree v. Road Dist., 240 U. S. 242, l. c. 247;
St. Louis K. C. Land Co. v. Kansas City, 241 U. S. 419;
Londoner v. Denver, 210 U. S. 373;
Improvement Dist. No. 2 v. Mo. Pac. R. R., 275 Fed. 600 (8th Cir.);
Coe v. Armour Fertilizer Co., 237 U. S. 413;
Fallbrook v. Bradley, 164 U. S. 112;
Security Trust Co. v. Lexington, 203 U. S. 323;
Road Improvement Dist. No. 2 v. Mo. Pac. R. R., 275 Fed. 600;
McGehee on Due Process of Law, p. 248;
Hamilton on Special Assessments, Sec. 145;
McQuillin on Municipal Corporations, Sec. 2074;
Mound City Land & Stock Co. v. Miller, 170 Mo. 240;
McGhee v. Walsh, 249 Mo. 266, l. c. 284;
Farnham on Water & Water Rights, Sec. 232, p. 1091.

(b) Under the Charter of the City of St. Louis, the Board of Public Service makes the inquiry into the facts and drafts a bill for the establishment of the taxing district for the construction of a district sewer based upon its finding of facts, and recommends to the Board of Aldermen the adoption of the assessment. The Board of Public Service is a purely administrative board.

Charter of St. Louis, Article XIII and Art. XXII, Secs. 3 and 16;
Kansas City v. Ward, 134 Mo. 172.

(c) The Board of Aldermen is given no power under the charter to amend the bill, and must either adopt or reject it as it comes from the Board of Public Service. The Board of Aldermen cannot initiate an ordinance of this character, nor amend a bill recommended by the Board of Public Service.

American Tobacco Co. v. St. Louis, 247 Mo. 374;
State ex rel. Belt v. St. Louis, 161 Mo. 371.

(d) The Board of Aldermen, in passing the ordinance establishing the taxing district, did not act legislatively.

State ex rel. v. Gates, 190 Mo. 540;
McKenna v. St. Louis, 6 Mo. App. 320;
Parks v. Boston, 8 Pick. (Mass.) 218;
State v. Mayor, 34 N. J. L. 445.

(e) The Charter of the City of St. Louis makes no provision for notice or hearing on the establishment of the taxing district for sewers.

Charter of St. Louis, Art. XXII, Sec. 3;
St. Louis Malleable Casting Co. v. Geo. G. Prendergast Construction Co., 288 Mo. 197 (l. c. 210).

(f) The hearing to which the property owner is entitled is upon the questions which concern the amount of the assessment to be imposed upon his property. The hearing provided for by Section 3 of Article XXII of the Charter of St. Louis takes place after the taxing district has been established by ordinance, and affords no opportunity for review of that action.

Collier Estate v. Western Paving Co., 180 Mo. 362, l. c. 375;
Meier v. City, 180 Mo. 391;
Houck v. Drainage Dist., 248 Mo. 373.

(g) The hearing, in order to constitute due process, "must be given not **after** but before the assessment becomes a lien."

Soliah v. Heskin, 222 U. S. 522.

II.

Arbitrary and Unequal Assessment.

(a) The Missouri courts base the right to levy a tax for payment of the cost of a local improvement upon the principle that the property taxed is specially benefited by the improvement.

McCormack v. Patchin, 53 Mo. 33;
Asphalt Construction Co. v. Hauessler, 201 Mo. 400 (l. c. 411);
Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55, 58 (l. c.).

(b) The failure of the municipal authorities to include the twenty-three acres of the Calvary Cemetery and the "Kuhs" property, the latter being of approximately the same area as the property of plaintiff and standing in the same relation to the sewer as plaintiff's property, was arbitrary, and the assessment was wholly unequal in operation and effect and violative of the first section of the Fourteenth Amendment.

Masters v. Portland, 24 Ore. 161;
Scranton v. Levers, 9 Pa. Dist. 176;
Chicago v. Baer, 41 Ill. 306 (l. c. 311);
Seammon v. Chicago, 42 Ill. 192-196;
Primm v. Belleville, 59 Ill. 142;
Davis v. Litchfield, 145 Ill. 313;
Weeks v. Milwaukee, 10 Wis. 242, 264;
Henry v. Chester, 15 Vermont 460;

State ex rel. v. Laffingwell, 54 Mo. 458;
In Rooke's Case, 5 Coke 99b;
2 Farnham on Water & Water Rights, Sec. 172, p. 921 (1904 Ed.);
Clay v. Grand Rapids, 60 Mich. 451;
McKechnie Brewing Co. v. Trenton, 15 N. Y. (App. Div.) 139;
Stover v. Springfield, 167 Mo. App. 328;
Kan. City v. Baum, 167 Mo. 259, 301 (l. c.);
Dyer v. Harrison, 63 Cal. 447;
Helm v. Witz, 35 Ind. App. 131;
28 Cyc 1162;
Page & Jones on Taxation, Sec. 556, p. 905, Sec. 557, p. 907.

(c) The agreements to exempt the "Katie" property and the twenty-three acres of Calvary Cemetery within the natural watershed and drainage district, were invalid, being attempts to bargain away the taxing power of the city. These unlawful arrangements resulted in an unequal and inequitable distribution of the tax and an oppressive assessment against plaintiff's property.

St. Louis v. Meier, 77 Mo. 13;
Miners Bank v. Clark, 252 Mo. 20;
Vrana v. St. Louis, 164 Mo. 186;
St. Joseph v. Crowther, 142 Mo. 155;
McKim v. Independence, 175 Mo. App. 332;
Kelly v. Parker Washington, 144 Mo. App. 47;
Radcliffe v. Duncan, 130 Mo. App. 695;
McKechnie Brewing Co. v. Trenton, 15 N. Y. (App. Div.) 139 (l. c. 140);
McQuillin on Municipal Corps., Sec. 2005;
28 Cyc 1134.

(d) The ordinance establishing the taxing district in question is arbitrary and results in favoritism to the owners of the properties within the natural drainage area excluded, and in oppression upon those whose properties lie within the taxing district. The ordinance is violative, therefore, of the guaranty of the Federal Constitution of the equal protection of the laws.

Kansas City & S. Ry. Co. v. Road Improvement Dist., 256 U. S. 658;
Masters v. City of Portland, 24 Ore. 161;
Hanscom v. Omaha, 11 Nebr. 37;
Myles Salt Co. v. Iberia Drainage Dist., 239 U. S. 478;
Williams v. Eggleston, 170 U. S. 304, 311;
Gast Realty Co. v. Schneider Granite Co., 240 U. S. 58;
Road Improvement Dist. No. 2 v. Mo. Pac. R. Co., 275 Fed. 600 (8th Cir.);
Abernathy v. Fidelity N. B. & Tr. Co., 274 Fed. 801 (l. c. 805);
Norwood v. Baker, 172 U. S. 269;
Falbrook Irrig. Dist. v. Bradley, 164 U. S. 112;
Hagar v. Reclamation Dist., 111 U. S. 701;
Baumann v. Ross, 167 U. S. 548;
Dillon on Mun. Corp. (5th Ed.), Sec. 592;
Page & Jones on Taxation, etc., Sec. 555;
28 Cyc 1122;
Corrigan v. Gage, 68 Mo. 541;
Kansas City v. Hyde, 196 Mo. 498.

ARGUMENT.

I.

Want of Notice and Opportunity to Property Owner to Be Heard.

In the opinion of the Supreme Court of Missouri in this case, the Court makes the following declarations and findings (288 Mo. 210 [l. c.]; Tr., p. 103):

> "Under the charter of the City of St. Louis, Article XXII, Sec. 3, before the Board of Public Service shall recommend an ordinance for the construction of a sewer to be paid by special assessments, the Board of Aldermen, on recommendation of the Board of Public Service, shall establish or shall have established a sewer district, or joint sewer district against the property in which it is proposed to assess benefits. The charter establishes an arbitrary rule for the assessment of all property within the district so established, according to area. The Board of Aldermen has no power under the charter to amend such an ordinance emanating from the Board of Public Service, but must either adopt the ordinance as recommended, or reject it. **The charter makes no provision for notice to the property owner, nor for a hearing before the Board of Public Service or the Board of Aldermen upon the question of benefits; that is, upon the question of what property shall be included within the benefit district,** and there was not,

according to the testimony, any such notice or hearing in the matter of the establishing of the taxing district for Baden District Sewer No. 2." (Bold face type ours.)

The Court then holds that notice is not necessary to the validity of the assessment. The Court bases its conclusion upon the rule as laid down by this Court that the State Legislature, acting directly, may determine the extent of the district benefited by a public improvement and lay down an absolute rule as to the apportionment of the cost of the improvement among the properties included in the taxing district without notice. The Missouri Supreme Court cites, in support of its holding, the case of Meier v. City of St. Louis, 180 Mo. 391, l. c. 409. That case related to a provision of the Charter of St. Louis fixing the limits of the taxing districts for street improvements. The City of St. Louis is a political subdivision of the State of Missouri, having a charter framed and adopted under authority of the State Constitution. The provisions of the charter of the city have all the force and effect of acts of the State Legislature.

The contention of plaintiff in error in the state courts, and renewed here, is that, when a municipal corporation, as contradistinguished from the state itself, exercises the power of imposing a special tax for a local improvement, it must give notice and

opportunity to the property owner to be heard, although the State Legislature would have been under no such obligation if it had laid the tax.

As said by this Court in St. Louis K. C. Land Co. v. Kansas City, 241 U. S. 419 (l. c. 430):

> "Where assessments are made by a political subdivision, a taxing board or court, according to special benefits, the property owner is entitled to be heard as to the amount of his asssessment and upon all questions properly entering into that determination."

And in the case of Embree v. Road District, 240 U. S. 247, it was said of an act of Missouri:

> "As the district was not established by the legislature, but by the exercise of delegated authority (a County Court, the governing body of a community as the Board of Aldermen is of the City of St. Louis) there was no such legislative decision that its boundaries and needs were such that the lands therein would be benefited by its creation and what it was intended to accomplish, and this being so, it was essential to due process of law that the land owners be accorded an opportunity to be heard upon the question whether their lands would be thus benefited." (Parenthetical statement ours.)

The language of this Court in the opinions quoted and in other cases would seem to apply not only to

such local authorities as are judicial or administrative in their nature, but to all local authorities, even though legislative in character, for the Court mentions "political subdivisions" in addition to taxing boards and courts.

The Charter of the City of St. Louis delegates to it the power to assess special taxes for sewer improvements, but it does not delegate to the Board of Aldermen, as the legislative body of the city, the power to legislatively determine the taxing district. On the contrary, it is expressly provided in the Charter that the Board of Aldermen cannot initiate any action for making such an assessment and its discretion in such matters is limited to accepting or rejecting the findings of the Board of Public Service, a purely administrative board.

Municipal legislative bodies usually exercise judicial and ministerial, as well as legislative functions, and all of these powers are exercised through the same medium—an ordinance. The Supreme Court of Missouri, in State ex rel. v. Gates, 190 Mo. 540, speaking of the functions of the Common Council of Kansas City, which is also governed by a Constitutional charter as distinguished from one emanating from the State Legislature, said:

> "But a common council is not an essential part of the legislative department of the state; it possesses no inherent legislative power and is not

> in virtue of its own right, free from judicial control, but is only so when it is exercising legislative power conferred by law upon it and then only in respect of the exercise of that power."

The Supreme Court of Missouri in the case just mentioned, quotes with approval the following excerpt from the opinion of the St. Louis Court of Appeals, in McKenna v. St. Louis, 6 Mo. App. 320:

> "Municipal corporations are considered by law in two aspects. In one, their functions are chiefly ministerial and relate to corporate interests only. These include the making and improving of streets, the construction of sewers and other improvements and keeping them in repair, the holding of property for corporate purposes, etc."

In the case of Parks v. Boston, 8 Pick. (Mass.) 218, it was held that the power vested in the selectmen of Boston to lay out or widen streets "whenever in their opinion the safety or convenience of the inhabitants of the town shall require it," was judicial in its nature and similar to that vested in County Commissioners in relation to highways.

In the case of State v. Mayor, 34 N. J. L. 445, the distinction between ordinances passed in the exercise of the municipality's legislative powers and those pertaining to its other powers is clearly set forth. The

Court holds that the passing of ordinances providing for the making of particular improvements affecting property in one locality, the cost of which is to be defrayed by certain specified individuals, is not in the exercise of the ordinary legislative functions of the common council, and that with respect to such ordinances the individuals affected are entitled to be heard before the ordinance is passed.

Legislative recognition of the necessity for notice and hearing in the passage of ordinances of this character by a municipal legislative body is found in a recent act of the Legislature of the State of Missouri, entitled "An Act to empower cities to assess or reassess private property for the value of local improvements, and to create new assessment districts, if necessary, where the original assessment for such improvements has been adjudged invalid in whole or in part" (Laws of Missouri 1917, page 391). The second section of the act provides: "Before any ordinance making provision for such reassessment, or the recreation of such assessment district shall be put upon its passage, the Board of Aldermen, or other local legislative body before which it is pending, shall appoint a day upon which it will hear and consider any and all objections to such ordinance, and shall give public notice of the time and place and matter thus to be considered, which notice shall be addressed to all persons interested. * * * After said

hearing has been had, said ordinance may be passed, rejected or amended as justice may require."

The Charter of the City of St. Louis does not by its terms delegate to the Board of Aldermen the legislative power of the state in the matter of assessing special taxes, but commits merely to that board the duty, in the exercise of its ministerial functions, to approve or reject recommendations made by the Board of Public Service. There is no delegation of the exercise of free legislative discretion in these matters. In the establishing of a taxing district by such a board, it is, therefore, essential to due process of law that the landowners be accorded an opportunity to be heard upon the question of whether their lands would be thus benefited.

The statement in the opinion of the State Supreme Court in this case that "the interested parties were given due notice of the meeting of the Board of Public Service where all were given full opportunity to be heard as to, and complain of, any matter which might make it inequitable to construct the sewer as projected in the district established," has no reference to any notice or hearing upon the question of the assessment of benefits. In the Supreme Court's statement of the case, as hereinabove quoted, it is specifically declared that the "Charter of the City of St. Louis makes no provision for notice to the property owner, nor for a hearing before the Board of

Public Service or the Board of Aldermen upon the question of benefits, that is upon the question of what property shall be included within the benefit district." The hearing referred to by the Missouri Supreme Court was no doubt the one mentioned in Section 3 of Article XXIII, of the charter, which takes place **after** the taxing district has been finally established and has reference only to the character of the improvement. A similar provision in the prior Charter of the City of St. Louis was by the Supreme Court of Missouri construed to have application only to the making of the proposed improvement and the kind of material and manner of construction (Collier Estate v. Western Paving Co., 180 Mo., l. c. 390).

The decisions of the Supreme Court of the State of Missouri deny to the property owner the right to contend in court, in a suit to enforce the tax lien, that his property was not in fact benefited or that the amount assessed was not in accordance with such apportionment (Meier v. City of St. Louis, 180 Mo. 391).

In this respect the proceedings and state decisions are different from those considered by this Court in Walston v. Nevin, 128 U. S. 578, and Spencer v. Merchant, 145 U. S. 345.

That the hearing provided for by the Charter of St. Louis on the questions of whether the improve-

ment should be constructed and the manner of construction is not sufficient is well established by the decisions of this Court. The hearing which the property owner is entitled to is upon the amount of the assessment and those questions which enter into the determination of that fact (Londoner v. Denver, 210 U. S. 373).

It is respectfully submitted that the decision of the Supreme Court of Missouri in this case in holding that the ordinance establishing the taxing district was not void, although there was no provision for notice and hearing, was error.

II.

Ordinance Invalid Because It Levies an Arbitrary and Wholly Unequal Assessment.

The undisputed testimony shows an arbitrary and unequal distribution of the tax resulting from the exemption of 36.83 per cent of the area of the natural drainage district of the sewer, whereby an unreasonable and disproportionate burden was placed upon plaintiff and the other property owners taxed. The assessment was not made upon the basis of the benefits to the property assessed, but is so palpably arbitrary as to run counter to the Fourteenth Amendment.

As stated by this Court in **Gast Realty & I. Co. v. Schneider Granite Co., 240 U. S. 55:**

> "If the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

The rule as laid down in the Gast case has more recently been applied by this Court to the arbirary and unequal distribution of a drainage tax in the case of **Kansas City S. R. Co. v. Road Improvement District No. 6, 256 U. S. 658.**

In **Masters v. City of Portland, 24 Oregon, 161,** an assessment for a sewer, the taxing district for which had been established by ordinance, was attacked, as has been the assessment in the instant case, on the ground that it was unequal, unjust and arbitrary, because a large amount of property benefited by the sewer had not been assessed and thereby plaintiff's property was obliged to bear an unequal proportion of the cost. The Charter of the City of Portland invested the Council with a discretion in apportioning the benefits of a local assessment, but the Court held that the arbitrary and intentional omission of property benefited from the assessment

district rendered the assessment void. The Court said that there could be no such thing as a valid taxation when the burden is laid without rule, either in respect to the subject of it or to the extent to which each must contribute, and that in this respect the Legislature is as powerless as any subordinate authority, it being impossible that there should be taxation that is at once arbitrary and valid.

In the case of **Hansoom v. Omaha, 11 Nebr. 37, l. c. 44,** it was held that "when the Mayor and Council formed a sewage district by arbitrary lines and without regard to the topography or drainage of the city and made such sewer district a taxing district upon which special assessments might be levied for the construction of sewers in any part of the district without regard to the special benefits to property, they exceeded their authority and their action is a nullity."

The Charter of the City of St. Louis delegates to the Board of Aldermen, upon the recommendation of the Board of Public Service, a discretionary power in the laying out of a taxing district for district sewers and the cost of the sewer is then under the terms of the charter automatically assessed against all of the property within the taxing district, as so defined, ratably according to area. An abuse of such discretion by the arbitrary levy of a tax without regard to the benefits, results in a taking of property

for public use without just compensation and is the denial of the equal protection of the laws. To uphold this tax would be a practical recognition that the power of the city in the levying of such a tax is unlimited (Abernathy v. Fid. N. B. & Tr. Co., 274 Fed. 801).

The holding of the Supreme Court of Missouri that there was no evidence of fraud and much less any evidence connecting the contractor with fraud, does not dispose of the contention of plaintiff that the ordinance establishing the benefit district was void because it resulted in an arbitrary apportionment of the tax without regard to the benefits. The ordinance was subject to that criticism whether the board creating the district was guilty of fraud or not. It is not the motive of the assessing board which determines the validity of the assessment, but the resultant effect. If the ordinance results, as it does here, in an unequal and disproportionate assessment, bearing no relation to the benefits, it impinges the constitutional guarantees and is invalid.

In the case of McCormick v. Patchen, 53 Mo. 33, the Supreme Court of Missouri said:

> "The whole theory of local taxation or assessment is that the improvements, for which they are levied, afford a remuneration in the way of benefits. A law which would attempt to make one person or a given number of persons, under

> the gains of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation."

That in effect was also the holding of this Court in the case of Norwood v. Baker, 172 U. S. 269.

The ordinance violates the requirements of approximate equality in the apportionment of special taxes and is unconstitutional. Being unconstitutional, it cannot be the basis of a valid tax.

We respectfully submit that the tax bill in suit is void, and that the judgment of the Supreme Court of Missouri should be reversed.

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Of Counsel.

(28440)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

ST. LOUIS MALLEABLE CASTING COMPANY,
Plaintiff in Error,
vs.
GEORGE G. PRENDERGAST CONSTRUCTION COMPANY,
Defendant in Error.

No. 154

IN ERROR TO THE SUPREME COURT OF MISSOURI.

Statement, Brief and Argument of Defendant in Error

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SUBJECT INDEX.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

ST. LOUIS MALLEABLE CASTING COMPANY, Plaintiff in Error, vs. GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, Defendant in Error.	No. 485.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

Statement, Brief and Argument of Defendant in Error

STATEMENT.

This is a suit to cancel special tax bills issued against property of plaintiff in error for its proportional part of the cost of a district sewer in the City of St. Louis, Missouri. The grounds alleged for the relief sought are that the assessment against plaintiff's property was excessive because the taxing district as established excluded two parcels of ground

belonging to the Calvary Cemetery Association and to one Kuhs, respectively, which were in the drainage area, and that thereby plaintiff in error was denied due process of law and the equal protection of the law; that the establishment of the sewer district under the charter and ordinance of the City of St. Louis, which provided for no hearing to property owners prior to the establishment of the district deprived plaintiff in error of its property without due process of law; that the establishment of the sewer district with the exclusion of the parcels of ground belonging to the Cemetery Association and to Kuhs was arbitrary and the result of an unlawful bargain with the City officials; that the St. Louis Charter provision for the establishment of sewer districts in which the cost of the sewer is assessed upon the parcels of ground in proportion to their area denies to plaintiff in error the equal protection of the laws and constitutes a taking of plaintiff's property without due process of law; and that the assessment of the special tax upon the property of plaintiff in error amounts to confiscation for public use, and is a taking of its property without due process of law. Upon a hearing had, the trial court found in favor of the defendant and entered a judgment dismissing plaintiff's bill. This was affirmed by the Supreme Court of Missouri (288 Mo. 197), and thereupon plaintiff in error brought the case here by writ of error.

Plaintiff in error petitioned for, or at least agreed to, the construction of this sewer (Rec. 50), and while the work of construction was in progress connected its premises therewith (Rec. 86). After the sewer had been completed and while enjoying the benefits thereof

through the connection of its property with this sewer system plaintiff in error filed this suit. The utility of the sewer is not questioned nor is it contended that the contractor who did the work was at fault in any way.

The Charter of the City of St. Louis, adopted under authority of the Missouri Constitution has the force and effect of a legislative enactment and empowers the city to establish sewer district and construct sewers therein. This charter provides that before the enactment of an ordinance for the construction of a district sewer the Board of Aldermen, on recommendation of the Board of Public Service, shall establish a benefit or taxing district, and the Board of Public Service shall thereupon designate a day upon which it will consider the proposed work and give two weeks' public notice of the time, place and matter to be considered. After the hearing is had pursuant to this notice, the Board of Public Service decides what work it proposes to recommend to the Board of Aldermen and opportunity for remonstrance is then given to interested parties. If no remonstrance is filed, or if in spite of a remonstrance, the Board of Public Service is of the opinion that the work should be done, it transmits to the Board of Aldermen a draft of an ordinance authorizing the proposed work and the Board of Aldermen passes or rejects that ordinance as in its discretion it sees fit.

In the present case the Board of Public Service, after thorough investigation and extended discussion, recommended to the Board of Aldermen the ordinance defining the boundaries of this sewer district. Plaintiff in error expressly disclaims any intention to charge corruption or impropriety of motive (Rec. 73)

on the part of the city officials, but complains that two tracts of land were omitted from the district which should have been included therein, and that the omission of such tracts was so arbitrary and unfair as to invalidate the entire assessment. One of the tracts thus omitted is a portion of Calvary Cemetery and the other is a tract of land mentioned in the evidence as the "Kuhs" property. The reason why the Board of Public Service recommended that these two tracts be excluded from the district was that in the judgment of said Board both tracts were adequately drained at private expense into a public sewer and were not benefited by this district sewer. President Kinsey of said Board testified in this case and stated the position of the Board as follows (Rec. 71, 72):

"Q. What I would like to know is why you left these properties out of that sewer district?

A. Will I explain that?

The Court: Yes, sir.

A. In the first place, with respect to the cemetery property, the center of it lies entirely on the west of this district, and is property which will not in all probability ever be built up with houses, and therefore all the drainage from there is surface water due to rains, and if the owners of the property, or their representatives, expressed the desire to build a sewer along the west side of Broadway, and accept all the surface drainage coming from the cemetery property and carried direct to the sewer, so that none of their drainage would enter into this proposed district or into the sewers in the proposed district; and, with that provision having been made, it was the judgment of the Board that it was fair to exclude that area from the sewer district, because none of the water would enter into the sewer. There was this further consideration, that if that area had been included in the area to be

drained, then the sewers carrying through this district from the west side of Broadway would have to be larger, and it would have increased the size of all the main sewers through there; therefore, by excluding it and permitting this drainage to be carried to the main sewer, we could design the plans of the sewer in a smaller size.

Mr. Taylor:

Q. With reference to the Kuhs property?

A. That was an area lying immediately adjacent to the main sewer itself. It is property that lies with the drainage which, if I recall it, went directly to the main sewer and did not need the intervention of any additional sewers to carry the drainage to the main sewer, and it was already sewered, and sewers of a nature which with slight alterations would be acceptable as permanent sewers; and there was none of the drainage in that area which would naturally go through the rest of the sewers designed in that district; and for that reason we didn't conceive it just to assess the property, because the sewer designed to surround it was of no service to the property as it had its own sewers."

In addition to this testimony of Mr. Kinsey there is ample evidence in the record that neither of said omitted tracts of land had any need for this sewer. (Rec. 22, 25, 41, 43, 77.)

The evidence further shows that plaintiff in error either petitioned for the construction of this sewer or at least verbally agreed that it might be constructed (Rec. 50, 51), and that when the sewer was about 50 per cent completed plaintiff in error connected its premises therewith (Rec. 86).

Plaintiff in error says that the size of the sewer is greater than is necessary for the drainage of the area taxed and in support of this charge quotes a portion

of the statement of the case contained in the opinion of the Supreme Court of Missouri (Rec. 106), but neglects to mention that in making this statement the court was merely referring to the testimony of one witness and that later in the opinion (Rec. 109) the court specifically calls attention to defendant's evidence tending to show "that the dimensions of district sewer were not originally designed to drain any portion of the cemetery or Kuhs properties and that the district sewer as designed and laid out was exactly adapted to the present district according to the best expert opinion on the subject."

This statement of the Court is amply sustained by the evidence. (Rec. 83, 84, 87.)

The propriety of the omission from the assessment district of the said cemetery property and Kuhs property is a question of fact which has been found against plaintiff in error by both the trial court and the Supreme Court of Missouri. In the language of the Supreme Court (Rec. 110), "The plaintiff makes a very plausible case by the allegations of its petition, but it is not supported by either the evidence in the case or the findings of the trial court.

"The tax bill sued on was prima facie evidence of its validity; and the testimony in the case was ample to support its validity and not tending to overturn it." The opinion of the Supreme Court of Missouri will be found reported in 288 Mo. 197.

POINTS AND AUTHORITIES.

I.

Notice and hearing to property owners was not essential to the validity of the ordinance establishing the assessment district.

When a sewer district is organized by direct legislative enactment or by a municipal ordinance passed pursuant to direct grant of legislative power no notice or hearing to property owners is necessary.

Goldsmith v. Prendergast Const. Co., 252 U. S. 12;
Hancock v. Muskogee, 250 U. S. 454;
Withnell v. Construction Co., 249 U. S. 63;
Embree v. Road District, 240 U. S. 242;
Shumate v. Heman, 181 U. S. 402;
Williams v. Eggleton, 170 U. S. 304;
St. Louis Malleable Casting Co. v. Prendergast Const. Co., 288 Mo. *l. c.* 210;
Meier v. St. Louis, 180 Mo. 391;
Heman v. Schulte, 166 Mo. 409;
Heman v. Allen, 156 Mo. 534.

The Charter of the City of St. Louis has the force and effect of a statute and confers upon the city full power with reference to the establishment of sewer districts and the construction of sewers therein. Hence a legislative determination establishing a sewer district made by the Board of Aldermen of the City of St. Louis is of the same effect as though made by the State Legislature.

Goldsmith v. Prendergast Const. Co., 242 U. S. 12;
Hancock v. Muskogee, 250 U. S. 454;
Withnell v. Construction Co., 249 U. S. 63;

Meier v. St. Louis, 180 Mo. 391;
Heman v. Allen, 156 Mo. 534.

II.

Notice and hearing were in fact given to property owners.

Had it been necessary to the validity of the ordinance defining the assessment district that the property owners be given an opportunity to be heard the notice and hearing provided for by the charter would have been sufficient to meet this requirement.

Charter City of St. Louis, Article XXII, Sec. 3.
St. Louis Malleable Casting Co. v. Prendergast Const. Co., 288 Mo. 197.
Hodge v. Muscatine Co., 196 U. S. 276, *l. c.* 281.

III.

Plaintiff in error petitioned for the construction of the sewer and while it was being constructed connected its property therewith.

Having petitioned for, or consented to, the construction of the sewer under the Charter and ordinance provisions, it can not now be heard to complain that it was not afforded notice and hearing.

Daniels v. Tearney, 102 U. S. 415;
Cross v. City of Kansas, 90 Mo. 13;
State ex rel. v. Mastin, 103 Mo. 508.

IV.

The action of the municipal authorities is conclusive.

In the absence of fraud the action of the Municipal Authorities in establishing a sewer district is conclusive.

Goldsmith v. Prendergast Const. Co., 252 U. S. 12;
Hancock v. Muskogee, 250 U. S. 454;
Withnell v. Construction Co., 249 U. S. 63;
and other cases cited *supra* under Point I.

There is no evidence of fraud in this case, on the contrary there is an express disclaimer thereof. (Rec. 73).

The action of the Municipal Authorities in this instance, if reviewed by the courts, will be found to be based upon substantial reasons and considerations of justice.

V.

The Municipal Authorities of the City of St. Louis are the sole judges of the dimensions of contemplated sewers.

Heman v. Allen, 156 Mo. 534.

In the present instance the evidence shows that the dimensions of the sewer are in accord with the best expert judgment on the subject.

VI.

Estoppel.

Silent acquiescence with knowledge of the improvement, especially when accompanied by acceptance of its benefits, estops the property owner from denying the validity of the assessment.

St. Louis Malleable Casting Co. v. Prendergast, 288 Mo. *l. c.* 210;
Daniels v. Tearney, 102 U. S. 415;
Paving Co. v. Fleming, 251 Mo. 210;
Cross v. City of Kansas, 90 Mo. 13;
Wright v. Davidson, 181 U. S. 371, 377;
State ex rel v. Mastin, 103 Mo. 508;

Smith v. Carlow, 114 Mich. 67;
Atkinson v. Newton, 169 Mass. 240.

VII.

Questions of Fact.

This being a writ of error to a State Court, this Court will not review questions of fact but will accept the conclusions of the State tribunals as final.

Chrisman v. Miller, 197 U. S. 313;
Gleason v. White, 199 U. S. 154;
Mammoth Mining Co. v. Grand Central Mining Co., 213 U. S. 74;
Carlson v. Washington, 234 U. S. 103.

ARGUMENT.

The first contention made by learned counsel for plaintiff in error is that "when a municipal corporation, as contradistinguished from the state itself, exercises the power of imposing a special tax for a local improvement, it must give notice and opportunity to the property owner to be heard, although the state legislature would have been under no such obligation if it had laid the tax." (Brief of plaintiff in error, page 20.)

The recent decisions of this court in the cases of Withnell v. Ruecking Construction Co., 249 U. S. 63, 69; Hancock v. Muskogee, 250 U. S. 454; and Goldsmith v. Prendergast Const. Co., 252 U. S. 12, effectually dispose of this contention.

In the Withnell case this Court says:

> "We are of the opinion that the assessment made in accordance with the rule of the St. Louis Charter was legislative in character and required no previous notice or preliminary hearing as to the nature and extent of benefits in order to maintain its constitutional validity." (*l. c.* 69.)

In the said case of Hancock v. Muskogee, the precise point here urged by plaintiff in error was presented to the Court and concerning it this Court says:

> "Where full legislative authority over the subject matter has been conferred by the state upon a municipal corporation, a legislative determination by the local legislative body is of the same effect as though made by the state legislature." (*l. c.* 458.)

Other decisions of this Court and of the Supreme Court of Missouri of like tenor are cited under Point 1 of our brief, *supra*.

And there can be no question but that the State of Missouri has given the City of St. Louis, by its charter, full legislative authority over the subject of local improvements including sewer construction, and special assessments therefor.

> Revised Code of St. Louis, 1914, Art. I, Sec. 1 (3), p. 533; Art. I, Sec. 1 (14), p. 535; Art. IV, Sec. 1, p. 549.

As has been said by this Court as to that charter:

> "The establishment of sewer districts was committed to local authorities by the charter of the City of St. Louis which had the force and effect of a statute of the State."
>
> Goldsmith v. Prendergast Const. Co., 252 U. S. 12, *l. c.* 17.

That charter provides that sewer districts shall be established by ordinance recommended by the Board of Public Service and duly enacted by the Board of Aldermen (Art. XXII Sec. 3), and that the cost of a sewer constructed within a district thus established shall be assessed as a special tax ratably by area on all parcels of ground within said district (Art. XXII Sec. 16). Under these provisions sewer districts are established by the municipal legislature under direct legislative authority, and the charter, with statutory force thereupon fixes the basis for assessment. The area rule of assessment prescribed by the charter has frequently been upheld by this court. In the said case of Hancock v. Muskogee 250 U. S. 454 this court refers to said rule in the following language:

"Whether the cost shall be distributed according to area or value or other method is a matter of legislative discretion."

The rule of law contended for by counsel for plaintiff in error and the authorities cited by them apply only where the district is defined or the assessment is levied by local authorities that are administrative or judicial in their nature.

Where, as in the present case, the district is established by the municipal legislature under statutory authority, notice to property owners and opportunity to be heard is not essential. That has been directly decided by this Court in a case arising under the charter of the City of St. Louis which was replaced by the present charter. That provided for district sewers to be paid for by special taxes upon the property in the district (Article VI, Section 20), and provided for the delineation of the district by an ordinance, and then for an ordinance providing for the construction of the sewer, and afterwards for the assessment of the cost ratably upon the parcels of ground in the district. (Article VI, Sec. 21.) No notice at any stage of the proceeding was provided for in that Charter and under it, it was held by the Supreme Court of Missouri that those Charter provisions for the construction of a district sewer and the issuance of special tax bills against the property in the district for the payment thereof did not violate the constitution of Missouri, nor the due process clause of the 14th Amendment to the Constitution of the United States.

Heman v. Allen 156 Mo. 543.

That case reached this Court on writ of error under

the title of Shumate v. Heman and was affirmed by this Court on the strength of prior decisions.

Shumate v. Heman 181 U. S. 402.

So therefore even if there had been no provision whatever in the present Charter for notice or hearing as to the improvement in question, the situation would have been the same as it was in Shumate v. Heman, that is the tax bills would not have been subject to the attack here made upon them.

But even if notice and hearing were in fact necessary to the validity of this assessment that which is provided for by the Charter and which was in fact given in this case would be sufficient to fulfill this requirement.

Section 3 of Article XXII of the Charter provides that in order to construct a district sewer, the following steps must be taken:

1st: The Board of Aldermen, upon the recommendation of the Board of Public Service must establish a taxing district;

2nd: After the taxing district has been established the Board of Public Service must designate a day on which "it will consider the proposed work or improvement," and give two weeks public notice of the time, place and matter to be considered. At the time thus designated interested parties may appear and be heard;

3rd: After such hearing has been had the Board of Public Service must file its final decision in its office stating the work or improvement determined upon, if any;

4th: Property owners have 18 days after the filing of such decision within which to remonstrate against

the proposed work and if the owners of the greater area of land in the district file their written remonstrance against said work, the Board of Public Service must reconsider its action at its next meeting and may then reverse its action or transmit to the Board of Aldermen a draft of the ordinance authorizing the proposed work, together with such remonstrance.

The fact that the hearing is had after the district has been defined by ordinance, is immaterial because it is provided for before the construction of the improvement is authorized. This Court has decided that even in those cases where a notice and hearing is required it is not necessary that such hearing should be the initial act in the proceeding for the construction of the sewer. In such cases "if the taxpayers be given an opportunity to test the validity of the tax at any time before it is made final whether the proceedings for review take place before a board of a quasi judicial character or before a tribunal provided by the State for the purpose of determining such questions, due process of law is not denied."

Hodge v. Muscatine County, 196 U. S. 276, *l. c.* 281.

And there is no reason why a property owner appearing at such hearing may not raise the point that he will receive no benefit, or that all property owners within the district will not be equally benefited, and that therefore the proposed work should not be done until the district has been redefined. Disproportionate benefits or injustice of any kind would certainly be a proper reason to advance why the work as contemplated should not be done in the district as established, since the object of the meeting is to "consider the

projected work or improvement." It would be a very narrow construction to say that the right of hearing thus afforded the property owner goes only to the nature of the improvement to be made. It is more reasonable to say that it goes to all matters which should properly be taken into consideration in determining whether within the district as established the proposed work should be done. Any discrimination or disparity of benefits would clearly be a proper matter for consideration. It will be observed that after this hearing the Board must file its decision, saying what work should be done, *if any*. If for any good reason it would be oppressive or unjust to construct a sewer in the district as defined, it would clearly be the duty of the Board to abandon the project after this injustice is pointed out to it.

The Supreme Court of Missouri in its opinion in this case held that if any notice and hearing were necessary the one thus provided was sufficient. In the second subdivision of its opinion (Rec. 111), the Court says:

> "Moreover the interested parties were given due notice of the meeting of the Board of Public Service where all were given full opportunity to be heard as to, and complain of, any matter which might make it inequitable to construct the sewer as projected in the district established."

Counsel for plaintiff in error at pages 19 and 20 of their brief quote a paragraph from the opinion of the Missouri Supreme Court as being a "declaration and finding" that the charter makes no provision for notice or hearing to property owners, but it is apparent that the remarks of the Court to which counsel refer

were not intended as a finding or declaration of fact, but were merely in the nature of a recital of the contention made by plaintiff in error. The portion of the Court's opinion which we have above quoted conclusively shows that the Court held that the notice and hearing provided for by the charter meets all constitutional requirements.

Counsel for plaintiff in error say that the taxing district in this case was not in fact laid out by the Board of Aldermen, but was laid out by the Board of Public Service. This is clearly a fallacy. The charter of the City confers no right upon the Board of Public Service to establish sewer districts (See Charter Art. XXII, Sec. 3). Its function in this regard is limited to the recommending of ordinances to the Board of Aldermen. When an ordinance is thus recommended the Board of Aldermen may pass it or reject it as in its discretion it sees fit. It is for the Board of Aldermen to determine legislatively whether or not the ordinance recommended shall be enacted into law. It is true that the Board of Aldermen can pass no such ordinance unless it is recommended by the Board of Public Service, but this is merely a precaution requiring the Board of Aldermen to take no such action without expert advice. The Board of Public Service is composed of engineers and technical men qualified to act in an advisory capacity to the Board of Aldermen in matters of this kind.

That the enactment by the Board of Aldermen of an ordinance recommended by the Board of Public Service is not a legislative act is indeed a novel proposition. No authority in support of it can be found. Such recommendation must precede the enactment of

the ordinance, but the enactment of the ordinance is nevertheless a legislative act; otherwise there would be no occasion for the ordinance.

The undisputed evidence shows that plaintiff in error either petitioned for the construction of this sewer, or at least agreed in advance to its construction (Rec. 50), and that it connected its property therewith and thereby availed itself of the benefits thereof (Rec. 50, 86).

Witness Raithel, one of the officers of plaintiff in error, testified in its behalf as follows: (Rec. 50.)

"Q. Were you familiar with the acts of your company with reference to the construction of this sewer?

A. Surely.

Q. Your company was one of the petitioners, was it not? A. Yes, sir.

Q. For the sewer? A. Yes, sir; we were.

Q. And your company made application pending the construction of the sewers for a license to connect?

A. Yes, sir.

Q. And subsequently you did connect? A. In this one instance, as stated.

Q. I say you made a connection? A. Yes, sir.

Q. And have maintained that connection ever since?

A. Yes, sir; we agreed to the permit for the benefit of the community; not for any benefit of ours exactly.

Q. But you petitioned for it?

Mr. Walther (Q): Do you mean that you signed a petition? A. No, sir; it was agreed."

Witness Hennessy, testified for defendant (Rec. 86), that in 1916 he was a rodman in the sewer department of the City of St. Louis and that in August, 1916, the St. Louis Malleable Casting Company applied to the city for a connection with this District Sewer No. 2 and that he supervised the making of that connection.

This testimony is without contradiction and in itself bars plaintiff in error from successfully contesting this assessment. When plaintiff in error petitioned for this sewer, or agreed to its construction, as the case may be, it thereby necessarily asked to have the sewer constructed under and in accordance with the provisions of the existing charter and ordinances of the City of St. Louis. They were the only authority under which the municipal officers could have the work done and pay for it, and therefore when appellant asked those officers to have the work done in accordance with the existing charter and ordinance provisions, appellant thereby waived any right to object to the work or its payment in accordance with the charter and ordinances on the ground that it constituted the taking of property without due process of law. As has been said by this Court:

> "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit."

Daniels v. Tearney, 102 U. S. 415.

In such cases the maxim "**volenti non fit injuria**" applies in all its efficacy.

Cross v. City of Kansas City, 90 Mo. 13.
State ex rel v. Mastin, 103 Mo. 508.

At page 24 of their brief, counsel for plaintiff in error make reference to the laws of Missouri of 1917,

page 391. The Act referred to pertains to reassessments only and was enacted several years after the present assessment was levied. It has nothing whatsoever to do with the present case.

II.

The next contention made by counsel for plaintiff in error is that this assessment is distributed in an arbitrary and unequal manner. This proposition is based solely on the exclusion from the district of the Cemetery and Kuhs properties. The evidence very plainly shows that neither of these excluded properties had any need for this sewer or was benefited by it while on the other hand the property of plaintiff in error did need the sewer, did make use of it, and derived direct benefit from it. As stated in our statement, *supra*, both the trial court and the Missouri Supreme Court have found in favor of defendant in error upon this question of fact as to whether this tax was unfairly distributed (See Rec. 110 Subdivision of Supreme Court's opinion). The Supreme Court in affirming the judgment of the lower court said (Rec. 110):

> "The plaintiff makes a very plausible case by the allegations of its petition, but it is not supported by either the evidence in the case or the finding of the trial court."

The evidence set out in the record fully sustains the finding of facts in favor of the defendant, by both the trial Court and the Supreme Court. In the consideration of the contemplated construction, before the Board of Public Service, it was stated by the president of the Board, and apparently concurred in by all of

the persons present (Rec. 39) that: "The use of sewers for sanitary purposes does not increase the cost of the sewer. When the sewer is designed sufficiently large to take care of the storm water it does not have to be built any larger for the foul water drainage." Thus the difference in the character of the houses or other improvements upon the various tracts of land in the district is without influence upon the benefits the various parcels of ground derive from the sewer, and the charter provisions for an assessment of the cost in proportion to the area of the parcels of ground is equitable and just. At a subsequent meeting of the Board (Abs. 43), it was concluded to give the Cemetery the right to build a drain of its own to the Baden public sewer and to permit the Kuhs property to use its existing private sewer system connecting with the Baden public sewer, and to exclude both of said tracts of ground from deriving any benefit from or use of the district sewer here in question. Although one of plaintiff's witnesses, Mr. Dodds, testified that the sewers as constructed in this sewer district were larger than were necessary to take care of the sewering of the lands in the prescribed district, this is in conflict with the testimony of two of the City's engineers who testified on behalf of the defendant. Mr. Horner (Rec. 84), testified that the sewers as constructed in the district were, according to the best engineering opinion, just exactly right for the district as laid out, and Mr. Keller testified (Rec. 87), that the size of the sewers with reference to the sewage to be carried was exactly right. It thus appears that the Calvary Cemetery having built a private drain for its property leading to the Baden public sewer, and the Kuhs property having

already established therein a system of private sewers leading to the same Baden public sewer, those properties did not need the use of this District sewer, and for that reason were excluded from the drainage district, and the sewers therein were constructed of the right size for the necessary sewering of the properties in the district as laid out, and including the property of plaintiff. Mr. Kinsey, the president of the Board of Public Service, testified (Rec. 74), that the Board found that the property of the plaintiff, the St. Louis Malleable Casting Co., needed this sewer facility, and when the sewer was completed the plaintiff, according to the testimony of Mr. Meckfessel (Rec. 47-8), and of Mr. Raithal, plaintiff's assistant secretary, connected with and made use of this District sewer system. The evidence therefore fully sustains the finding of the Missouri Courts on the question of facts involved in the contention of the plaintiff in error, against those contentions. Such findings of fact are conclusive on this Court, as it has been said by this Court: "In cases coming from a State Court we do not review questions of fact, but accept the conclusions of the State tribunal as final."

Christman v. Miller, 197 U. S. 313.

While there are certain exceptions to this general rule as pointed out in Gleason v. White, 199 U. S. 154; Mammoth Mining Co. v. Grand Central Mining Co., 213 U. S. 74; Carlson v. Washington, 234 U. S. 103, and other similar cases, those exceptions involve principles and facts different from those in the cause at bar. Thus it appears that even though the law were as plaintiff contends, which as we have shown it is not,

yet on the facts in the cause at bar the plaintiff has suffered no injury, nor has any wrong been done it through the construction of this District sewer system in accordance with the charter and ordinance provisions in question.

In the case of Goldsmith v. Prendergast Const. Co., 252 U. S. 12, it was contended that the failure to include a portion of Tower Grove Park in the same sewer district with the Goldsmith property was unjust discrimination because the omitted portion of the park naturally drained into the sewer. In disposing of this contention the Supreme Court of Missouri (273 Mo. 184 *l. c.* 197), says:

> "What is more, it is not shown that the city made any provision for admitting the water from the park into the city sewer, and so far as that showing goes, the amount of water that actually gets into the sewer from the park is negligible for the purpose of the case." * * * * "The City in laying out the sewer district had a right to consider the fact that nearly half the park front drained south and not into Kingshighway and that the other half was park grounds which absorb a large portion of the rainfall, unlike roofs and pavements which discharge all the water into the sewer."

This Goldsmith case then came before this Court on writ of error and this Court in its decision by Mr. Justice Day used the following language:

> "The mere fact that the Court found that a part of Tower Grove Park might have been drained into the sewer, it was held by the Missouri Courts, under all circumstances, did not justify judicial interference with the exercise of the discretion

vested in the municipal authorities. The Court commented on the fact that it was not shown that any considerable amount of surface water was conducted away from the park by this sewer. Much less do such findings afford reason for this Court, in the exercise of its revisory power under the Federal Constitution, to reverse the action of the State Courts, which fully considered the facts, and refused to invalidate the assessment."

The case at bar is much stronger in favor of the validity of the assessment than was the Goldsmith case, for the reason that in the Goldsmith case the omitted property drained into the sewer while in the present case it does not.

The case of Gast R. & I. Co. v. Schneider Granite Co., 240 U. S. 255, cited by counsel for plaintiff in error is not in point for several reasons.

In the first place that was a street improvement case and this involves a sewer construction. In the case of streets the benefit derived by the various parcels of ground in the improvement district, when not fronting on the street, necessarily varies with the location, character and use of the lot, while in the case of sewers all lands in the district derive the same rate of benefit, that is a benefit proportional to the area of the lots. This is true, because as explained by Mr. Kinsey (Rec. 39), "when the sewer is designed sufficiently large to take care of the storm water it does not have to be built any larger for the foul water drainage."

In the next place, in the Gast case the assessment district was defined according to a hard and fast rule applied to all assessment districts without regard to the conditions existing in the particular district established, while in the present case the district was not

defined according to any hard and fast rule, but its limits were defined with reference to the conditions existing in this particular case. It was the duty of the Board of Aldermen to take into consideration the situation that existed in this particular locality and to determine what property actually received the benefit of this improvement and to define the district accordingly, and this duty the Board of Aldermen, aided by the expert advice of the Board of Public Service, has done to the best of its ability and we believe with justice to all concerned.

In their statement (brief of plaintiff in error, page 8), counsel for plaintiff in error say that the size of this district sewer is greater than is necessary for the draining of the area taxed. This statement is based solely upon the testimony of one witness and is contrary to the testimony of Mr. Horner, Chief Engineer of Sewers of the City of St. Louis (Rec. 83 and 84), and of Mr. Keller, engineer in charge of sewer designing (Rec. 87), the testimony of both of whom has been heretofore referred to.

It is settled law of the State of Missouri that the dimensions of sewers are left to the discretion of the municipal authorities.

Heman v. Allen, 156 Mo. 534.

In the present case the testimony shows that the municipal authorities exercised this discretion to the best of their ability.

III.

It will be observed that in the 5th subdivision of its opinion the Supreme Court of Missouri holds that plaintiff in error is barred from relief upon the theory

of estoppel (Rec. 111). The judgment of the Court might well rest on this ground alone, and if so considered presents no federal question. Whether or not a party is estopped by his conduct from asserting a claim does not involve the constitutionality of statutes or ordinances, but is a matter of State law, not reviewable by this Court. This doctrine of estoppel has been recognized by many State Courts as well as by this Court, and with good reason has been held applicable to the facts of the present case by the Supreme Court of Missouri.

The judgment of the Supreme Court of Missouri in this case should be affirmed.

Respectfully submitted,

WM. K. KOERNER,
Attorney for defendant in error.

JAS. R. KINEALY,
WM. B. KINEALY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 154

ST. LOUIS MALLEABLE CASTING COMPANY,
PLAINTIFF IN ERROR,

vs.

GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

REPLY BRIEF OF PLAINTIFF IN ERROR.

LAMBERT E. WALTHER,
Attorney for Plaintiff in Error.

JOHN S. LEAHY,
WALTER H. SAUNDERS,
Of Counsel.

(28,440)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 485.

ST. LOUIS MALLEABLE CASTING COMPANY,
PLAINTIFF IN ERROR,

vs.

GEORGE G. PRENDERGAST CONSTRUCTION COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

REPLY BRIEF OF PLAINTIFF IN ERROR.

I.

Notice and Hearing to Property Owner.

(1.)

In support of their contention that the ordinance in suit, defining the benefit district, is equivalent to an act of the State Legislature and therefore notice and opportunity to the taxpayer to be heard are not essential to the constitu-

tionality of the ordinance, counsel for defendant in error, under Point I of their brief, cite certain cases, all of which are easily distinguishable from this case. We shall trespass upon the time of the court only to the extent of commenting upon the cases mentioned in the argument for defendant in error upon this point.

The case of Withnell *vs.* Ruecking Construction Co., 249 U. S., 63-69, dealt with a provision of the St. Louis charter prescribing a fixed method of assessment for street improvements. The court, after commenting upon the nature of the St. Louis charter, which was framed and adopted under authority of the State Constitution, holds, as do the Missouri courts, that the charter is accordingly on a par with an act of the State Legislature. The court then states the rule to be that "when the assessment is made in accordance with a fixed rule adopted by a legislative act the property owner is not entitled to be heard in advance on the question of the amount and extent of the assessment and the benefits conferred" (*l. c.*, 69), and holds the St. Louis charter to be of the same effect as an act of the Legislature.

The correctness of the rule as laid down in that case is not questioned by us, but the rule is not applicable to the instant case. The taxing district involved here was not established by the charter, nor in accordance with any charter rule, as in the case of taxation under the former St. Louis charter for street improvements. The determination of the benefits, that is the laying out of the taxing district, is left to the Board of Aldermen and Board of Public Service.

In Hancock *vs.* Muskogee, 250 U. S., 454, cited by defendant in error, this court considered itself bound by the holding of the Supreme Court of Oklahoma, that in respect

to the exercise of the power of taxation for the purpose of constructing local sewer systems the entire legislative power of the State has been delegated to the municipalities (*l. c.*, 456). It was therefore held that as "full legislative authority" had been conferred upon the municipal corporation "'legislative determination by the local legislative body is of the same effect as though made by the State Legislature" (*l. c.*, 458).

In the case at bar, the full legislative power has not been conferred upon the city of St. Louis. The charter does not give to the city the free exercise of the taxing power for the purpose of constructing local sewers. The charter prescribes that the tax shall be assessed ratably according to area in the taxing district. The establishing of the taxing district is the determination of the benefits, and that power is not by the charter conferred in general terms upon the city to be exercised freely and with full discretion by the city's legislation board. On the contrary, the city's legislative body cannot initiate the action and can do nothing whatever until it suits the pleasure of the Board of Public Service (a purely administrative body) to pass upon the question of the extent of the taxing district and submit its recommendations to the Board of Aldermen, which has no power to modify the recommended ordinance, but must adopt or reject it *in toto*. This plan must be distinguished from one whereby the legislative body refers a proposition to a technical or other administrative body for investigation and advice to guide it in the proper exercise of full legislative discretion.

In the remaining two cases referred to in the argument for defendant in error on this point, viz., Goldsmith *vs.* Prendergast Const. Co., 252 U. S., 12, and Shumate *vs.* Heman, 181

U. S., 402, the precise question here presented does not appear to have been raised.

The limitation in the charter of St. Louis upon the powers of the Board of Aldermen in the matter of taxation for sewers characterizes this as a delegation to the board in its administrative or judicial and not legislative capacity. The delegation is to the two boards—Public Service and Aldermen. The ordinance establishing the taxing district is the result of the combined action of the two bodies. The vote of the members of the Service Board on the recommendation of the ordinance is as essential to the creation of the taxing district as the vote of the aldermen upon the recommended ordinance. This method of laying out the taxing district by the intimate participation therein of a purely administrative body destroys all vestige of legislative character which the act might otherwise have. The effect of the charter scheme in sewer taxation, we respectfully submit, is to delegate to the Board of Public Service the determination of the extent of the benefits, subject to approval by the Board of Aldermen, which latter board in this matter likewise acts in an administrative capacity. The property owner should have the right to be heard before one or both of these boards before the question of benefits is finally foreclosed against him, for under the Missouri decisions the action of the Board of Alderman, in the absence of fraud, is final.

(2.)

Under Point II of the brief for defendant in error (p. 8) it is claimed that if notice and hearing were necessary to the validity of the ordinance establishing the taxing district, the notice and hearing provided by article XXII, section 3,

of the St. Louis charter (set out in brief for plaintiff in error, page 8) would be sufficient. In the argument for defendant in error (p. 16) it is stated that the Supreme Court of Missouri in the instant case so held in the second subdivision of its opinion (Rec., 111).

We cannot permit these statements to go unchallenged.

As pointed out in our original brief (pp. 9, 15, and 26), the hearing provided for by the charter takes place *after* the taxing district has been fully established and has no reference whatever to the apportionment of the tax. It has several times been held by the Supreme Court of Missouri that this section relates solely to the character of the improvement. The charter expressly provides that *before* the ordinance to authorize the construction of the improvement can be initiated the taxing district shall have been established. No provision is made for reviewing or modifying the action establishing the taxing district.

The statement in the opinion of the Supreme Court of Missouri (Rec., p. 111) is no holding that notice and hearing upon the laying out of the benefit district were provided by the charter or ordinance, but is merely to the effect that due notice was given the interested parties of a meeting of the Board of Public Service, where all were given opportunity to be heard to complain of any matter which might make it inequitable *to construct the sewer as projected in the district established* (Italics ours).

It will be noted that the court states that the hearing was limited to matters relating to the construction of the sewer in the taxing district *after* the district had been established.

Such hearing, even if it went to the apportionment of the tax, would be equivalent to no hearing at all, because the

question had already been foreclosed against the land owner, the taxing district having been previously finally established. The hearing, in order to constitute due process, must be given, not after but "before the assessment becomes a lien." Soliah *vs.* Heskin, 222 U. S., 522-24; Londoner vs. Denver, 210 U. S., 373.

It will be noted further that the court does not hold that either the charter or the ordinance defining the taxing district provided for notice or hearing on the question of the extent of the benefit district. To the contrary, the court in the "statement" part of the opinion states unequivocally that the charter makes no such provision for notice, "and there was not, according to the testimony, any such notice or hearing in the matter of the establishing of the taxing district for Baden District sewer No. 2" (opinion, Rec., p. 103).

II.

Unequal and Arbitrary Assessment.

In the brief for defendant in error (page 20) it is stated that the Supreme Court of Missouri found in favor of defendant in error upon the question of fact as to whether the tax was unequally and unfairly distributed. This contention is based upon the following statement in the opinion (Rec., 110):

"The plaintiff makes a very plausible case by the allegations of its petition, but it is not supported by either the evidence in the case or the finding of the trial court."

That statement appears in subdivision I of the opinion, and there is nothing to indicate what particular issues the

court has reference to. It is hardly possible that the questions of fact, (1) that 36.83 per cent of the area of the natural drainage district or water shed had been exempted from the tax; (2) that the "Kuhs" property could not be differentiated from the property of plaintiff in error, and (3) that the Kuhs and Calvary Cemetery properties were left out of the taxing district on grounds wholly aside from the question of a just apportionment of the tax; were intended to be ruled against plaintiff in error, for that would be in direct conflict with the following quotations from the courts' "statement:"

(1) "As shown by the plat of the taxing district and as testified to by Mr. Osthaus, the special tax assessor, the total area of the district as laid out is 2,296,039 square feet. Adding that to the area of the portion of Calvary Cemetery and the area of the Kuhs property within the natural drainage district, 3,634,919 square feet, so that only 63.17 per cent of the area of the natural drainage district has been included in the taxing district" (Rec., p. 106).

(2) "None of the members of the Board of Public Improvements who testified, nor Mr. Horner, the chief engineer, could give any satisfactory explanation of why the Kuhs property was left out of the taxing district while the property of the plaintiff, which admittedly had an adequate private system, which is still draining directly into the Baden public sewer, was included. It was suggested by one of these witnesses for defendant that there was some difference between the two parcels of land, in that the Kuhs property immediately adjoined the public sewer, but when it was pointed out to this witness that the plaintiff had a right

of way extending from its property to the public sewer, which right of way had been deeded to it by Kuhs, and that therefore plaintiff's property, to that extent, also abutted upon the public sewer, it was admitted that this was no substantial ground for differentiating between the two properties in the matter of the taxation for the building of the district sewer" (Rec., p. 108).

"This plaintiff's private sewer not only carried off the foul water, but also the surface water from the plaintiff's premises, and the evidence is undisputed that this private system of plaintiff was and would continue to be entirely adequate for the plaintiff's property" (Rec., 102).

(3) "According to the testimony, the matter was up for consideration before the Board of Public Improvements, sitting as a Committee of the Whole, on November 18, 1913. According to the stenographer's transcript of the proceedings before the board on that date, Mr. J. L. Hornsby, as attorney for the Calvary Cemetery, appeared and presented a request that the property of the Cemetery Association be excluded from the taxing district and thus exempted from contributing anything to the cost of the sewer.

"Mr. Hornsby stated to the board that Mr. Moreno, then Sewer Commissioner, had told him that twenty-three acres of the cemetery property sloped towards Broadway, and that the surface water would necessarily drain into the proposed sewer, and that Mr. Moreno estimated that the Cemetery Association's share of the cost of the proposed district sewer would be about $12,000.00. In the discussion before the board on that occasion, Mr. Moreno said: "I understand the attitude of Mr. Hornsby, and I think it is not unreasonable, at the same time we have to consider this, if we cut out that

twenty-two acres and assess the entire cost of those sewers against this district that is populated, some of the property owners may contest the tax bills, as it is evident that the sewers do have to be made 20 per cent larger than they otherwise would have to be built to take care of that property outside of the district, and I am afraid we might not be able to get a contractor to bid on the work."

And again, in the course of the same discussion, in answer to a question of one of the other commissioners as to whether there had ever been a case of exemption of that sort, Mr. Moreno replied: "I don't recall any since I have been here. We try to lay the districts out so they will be on a basis perfectly fair to all the property owners within the district, and for that reason we could not very well exclude territory of this kind."

Mr. Kinsey, the president of the board, expressed a similar view. He said: "The statement of the Sewer Commissioner, in case your cemetery was exempt, that is to say, in such an event, if the district was laid out as to exclude the cemetery, the city would have to pay the portion ordinarily assessed against the cemetery, and in that way, *in imposing upon the property owners in the district that additional burden,* it makes it difficult to exclude this cemetery in the present case."

Mr. Moreno thereupon suggested: "The only thing I see we can do is to move the line over *arbitrarily* a portion of the distance, if the board thought that could be done. Still, that is establishing a precedent that might get us into trouble later." To which Mr. Talbert, another commissioner, replied: "It seems to me you would have to follow the physical fact or lay yourselves open to future trouble."

The question of the elimination of the Kuhs property from the taxing district came before the board sitting as a Committee of the Whole, at a meeting held February 6, 1914. At this meeting Mr. Moreno, Sewer Commissioner, called attention to the fact that the Kuhs property had been left out of the plan for the district submitted by him. He stated in explanation that the property was not subdivided and was drained by two private sewers connecting with the public sewer. Then he continued: "Another thing, in order to properly drain the district, we are compelled to *have a right of way from Kuhs' property in which to lay some of our sewers. He gave that right of way with the understanding that if we accepted* it and laid out the district that his *property would be left out,* on the ground that he had started it and it did not drain through any of the district sewers. *If we decide to put his property in the district, we will have to give him back this right of way and enter condemnation proceedings to acquire it.* In order that these people may have relief we have to go ahead with the district and include this property in Calvary Cemetery, regardless of their protests, and it is an open question as to whether or not we should leave this other out or put it in. * * * It occurs to me that if we do leave this property out some of these other gentlemen who own vacant property might contest the tax bills."

On May 8, 1914, the question of the elimination of Calvary Cemetery and the Kuhs property again came up for consideration by the board. Mr. Hooke, who had succeeded Mr. Moreno as Sewer Commissioner, brought up the matter. He reported that something like twenty-three acres in Calvary Cemetery drained through the territory, and that he

had estimated that the cemetery should pay something like $12,000.00 as its proportion of the cost of the sewer. He recommended that if the Cemetery Association could take care of its own drainage he thought it would be fair to leave them out of the district, and that then the size of the district sewer could be cut. He also estimated that the private drain which the Cemetery Association would have to construct would probably cost $4,500.00. As to the Kuhs property, being asked by Commissioner Wall as to what he had done regarding that, he answered, "Nothing, for two reasons; *the first is he gave us all of those rights of way* (I was sitting in there with the Sewer Commissioner myself) *on condition that his sewers that were in there would be accepted, and if his sewers are accepted, there is no reason why we should put him in the district.* * * * I do not see anything wrong with it, especially in view of the fact if we don't do that *we must pass an ordinance and give him back those rights of way which were obtained under a misrepresentation*" (Rec., pp. 103-4-5. Italics ours).

(4) "The size of the sewer is greater than is necessary for the draining of the area taxed * * * The plans, according to Mr. Horner, were not changed after that meeting, and it is evident that the sewers, as constructed, are therefore 20 per cent larger than the requirements of the territory taxed called for" (Rec., p. 106).

In an equity suit, under the Missouri practice, the Supreme Court reviews the evidence, and these statements above quoted from the opinion have no proper place in the opinion if they are not specific findings of fact by the Supreme Court. There is nothing in the language or the context to indicate that the court was merely stating the contentions

of the plaintiff, as suggested by counsel for defendant in error. The only finding of fact against plaintiff in error is on the issue of fraud raised by the bill.

The rule relied upon by defendant in error, that in cases coming from a State court this court will not review questions of fact, is without application here. In a case like the one at bar, determination of the question of whether the law results in such an arbitrary and disproportionate assessment as to violate the Constitution, necessarily involves a consideration of the facts.

In Gast Realty & I. Co. *vs.* Schneider Granite Co., 240 U. S., 55, this court held that the St. Louis charter provision and the ordinance pursuant thereto, applied to the situation as disclosed by the evidence, were invalid. In the later case of Withnell *vs.* Construction Co., 249 U. S., 63, the same charter provision, together with the ordinance following it, applied to a different situation, were held valid. These two cases, as well as the more recent case of Kansas City & S. Ry. Co. *vs.* Road Improvement Dist., 256 U. S., 658, show clearly that the rule urged by learned counsel for defendant in error is not applicable. See, also, Hancock *vs.* Muskogee, 250 U. S., 454; *l. c* 457.

III.

Estoppel.

Based upon the 5th subdivision of the opinion of the Supreme Court, defendant in error suggests that the plaintiff in error was held barred from relief upon the theory of estoppel.

This paragraph of the opinion contains nothing more than the statement of an abstract legal principle. It is in no way connected up with the evidence. Nowhere in the

statement does the Supreme Court find any facts constituting estoppel. The only reference to estoppel is the statement that, after the evidence was all in, the defendant asked leave to amend its answer by adding thereto a plea of estoppel, but that this leave was not granted (Rec., 109).

This subdivision of the opinion follows the holding in subdivision IV that there was no evidence of fraud, and the court probably stated this general rule concerning estoppel with respect to the claim of fraud. Any other view would result in the overruling by implication of a long line of decisions by the Supreme Court of Missouri.

The following excerpts from Perkinson *vs.* Hoolan, 182 Mo., 189; *l. c.*, 193, shows clearly the position of the Missouri Supreme Court upon this proposition:

> "The act of 1893 having been declared unconstitutional by this court, the only question for our consideration is whether or not Hoolan, after *requesting the proper officer of the city to pass an ordinance by which his property would be improved, will be heard to say that he is not* liable for the assessed benefit upon the ground that the contract between the city and the contractor was not authorized by law. It seems to us that it would be carrying the doctrine of estoppel to an unwarranted extent, to hold that because a property owner petitions the proper authorities of a municipality to pass some ordinance of a public character which it had no authority to pass, but which it does pass, and which is beneficial to him, he would be estopped to deny the validity of such an ordinance." * * * (*l. c.*, 194.)
>
> *"Nor was Hoolan estopped from urging the invalidity of the tax bill because he stood by and made no protest when the plaintiff was doing the work on the faith of the ordinance and the contract.* * * * We quite agree with counsel for defendant 'that a

tax bill which is wholly void cannot be made valid by any act of the property owner whose property may be benefited by the improvement.' " (Italics ours.)

See, also:

Wheeler *vs.* City of Poplar Bluff, 149 Mo., 37.

Collier Estate *vs.* Western Paving & Supply Co., 180 Mo., *l. c.*, 390.

Verdin *vs.* City of St. Louis, 131 Mo., *l. c.*, 198.

State ex rel. *vs.* Murphy, 134 Mo., 549, *l. c.*, 567.

Perkinson *vs.* McGrath, 9 Mo. App., 26, *l. c.*, 28.

These rulings by the Missouri courts are in accord with the decisions of this court.

O'Brien *vs.* Wheelock, 184 U. S., 450-489.

Had the State Supreme Court intended to hold that the plaintiff in error was estopped from raising the questions under the Federal Constitution set up in its bill, the case could have been peremptorily disposed of by the court without discussing or ruling against plaintiff in error upon the constitutional questions. Neither is it conceivable that the petition for a writ of error to this court would have been granted by the Chief Justice of the Supreme Court of Missouri, if the case had been decided against plaintiff in error upon a question of local law.

Respectfully submitted,

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Of Counsel.

(7925)

ST. LOUIS MALLEABLE CASTING COMPANY *v.* GEORGE C. PRENDERGAST CONSTRUCTION COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 154. Argued December 7, 8, 1922.—Decided January 2, 1923.

An owner of property within a special sewer district, who connected his premises with the sewer when constructed and availed himself of its benefits, is estopped from maintaining a suit in which, upon the ground that the manner of constituting the district and apportioning the cost infringed his rights under the Fourteenth Amendment, he seeks to cancel the tax bill issued to the contractor against his property. P. 472.

288 Mo. 197, affirmed.

ERROR to a decree of the Supreme Court of Missouri, affirming a decree dismissing a suit brought by the plain-

tiff in error to cancel a sewer tax bill issued against its property to the defendant construction company.

Mr. Lambert E. Walther, with whom *Mr. John S. Leahy* and *Mr. Walter H. Saunders* were on the briefs, for plaintiff in error.

Mr. Wm. K. Koerner, with whom *Mr. Jas. R. Kinealy* and *Mr. Wm. B. Kinealy* were on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the Court.

Suit in equity to have declared invalid and canceled, a tax bill issued against the property of plaintiff in error, herein designated as plaintiff, for the construction of sewers in Baden Sewer District Number Two, City of St. Louis.

There is a charge of excess and resultant invalidity in the tax bill because the taxing district (sewer district) does not contain tracts of land which it should contain and that are within its drainage area.

The Fourteenth Amendment is invoked against the tax: (1) In that the limits of the sewer district and the apportionment of the cost between the several lots or parcels of land and their respective owners, without a hearing being accorded, deny plaintiff due process of law. (2) In the exclusion from the district of tracts of land as above stated, plaintiff is denied due process of law and the equal protection of the laws.

There is an elaborate detail of the particulars upon which the charges are alleged to rest. The particulars include the charter of the city and the various ordinances passed in executing its purpose, the action of the Board of Aldermen, and the action of the Board of Public Service in execution of the direction to contract for the construction of the sewers, and when constructed, to cause the

entire expense to be computed, to levy and assess such expense as a special tax in accordance with the requirements of the charter, and to issue a special tax bill against each parcel of ground liable.

And it is alleged that the defendant was awarded, under the requirement and directions of the ordinances, the contract, and received from the city special tax bills as authorized by the charter and ordinances, among which was one issued against the property of plaintiff for $9,168.86 which, it is alleged, purports to confer upon the holder thereof a lien authorized by the charter of the city.

The trial court, after reciting that it found "in favor of the defendant on the issues joined" and that the plaintiff was "not entitled to the relief prayed," adjudged and decreed that the suit be dismissed.

The Supreme Court affirmed the decree. The court reviewed at length the pleadings of plaintiff and said that the plaintiff made "a very plausible case by the allegations of its petition, but it is not supported by either the evidence in the case or finding of the trial court." The conclusion of the court, therefore, was that there was no arbitrary or discriminating exclusion of property from the district that was within the benefit of the sewer. And further, that "Defendant's evidence tended to show: The sewer, for proportionate part of cost of which appellant's ground was assessed, had been fully completed when this suit was brought, and appellant had *connected its said premises with this sewer and was in actual enjoyment of the benefits thereof.* [Italics ours.] The evidence fails to show any act of commission or omission on the part of the contractor. The appellant does not question the utility of the sewer. Yet, without offering to pay any part of its cost, appellant comes into a court of equity and asks that the entire assessment against its property be canceled."

The conclusion, in effect, was that the fact of connecting its premises with the sewer estopped plaintiff from denying the validity of the tax bill, and the conclusion was supported by the citation of a number of cases, including *Wight* v. *Davidson*, 181 U. S. 371.

The evidence leaves no doubt of the fact that plaintiff, during the construction of the district sewer, made application for a license to connect with it, and afterward did connect with it. The only reply that counsel make is that the court meant nothing more by its conclusion and the cases cited "than the statement of an abstract legal principle" which was "in no way connected up with the evidence." It is further said that "Nowhere in the statement does the Supreme Court find any facts constituting an estoppel."

The comment is not justified. Our quotations from the court's opinion establish the contrary, and that the plaintiff did something more than stand by and make no protest; it availed of the benefits of the sewer. The state cases cited are, therefore, not in point. Nor is *O'Brien* v. *Wheelock*, 184 U. S. 450, 489, of relevant consideration. It is not attempted here, as there, to enforce a law as of validity by estoppel to particular persons, though invalid, under the constitution of the State, to all of the world besides.

Finally, it is said that if the Supreme Court had intended to hold plaintiff estopped from raising the questions under the Federal Constitution, the case would have been peremptorily disposed of without discussing or ruling against those questions. And "Neither is it conceivable," it is further said, "that the petition for a writ of error to this court would have been granted by the Chief Justice of the Supreme Court of Missouri, if the case had been decided against plaintiff in error upon a question of local law." The propositions are not estimable in meaning except there is concession in them that if the estoppel

was ruled it was adequate to justify the court's decree. It was ruled. The effect is not lessened because the court ruled as well on the constitutional questions. As we have seen, the court said that the "plausible case" made by plaintiff "by the allegations of its petition" was "not supported by either the evidence in the case or finding of the trial court." Whether this conclusion received or needed aid from the force the court considered should be assigned to the establishment of the sewer district as furnishing an indisputable presumption of notice, is not absolutely clear. Nor is it clear whether the court considered that notice of the meeting of the Board of Public Service and opportunity to be heard before the Board satisfied the constitutional requirements urged by plaintiff.

However, we are not called upon to resolve the uncertainty, if any there be, in the grounds of the court's ruling upon the constitutional questions. It is enough for our action that the court considered plaintiff estopped to contest the validity of the sewer or the validity of the tax which was imposed by connecting its premises with the sewer. In that conclusion we concur.

Decree affirmed.